IN THE SUPREME COURT OF MISSOURI

THOMAS G. (JERRY) and NANCY S. THOMPSON, JAMES R. and BARBARA M. CAMPBELL, M. SCOTT and STACY HAUSMAN (HAUSMAN TRUST), WILLIAM M. McDANIEL, RALPH C. McDANIEL, STANLEY (LISTON) and MARTHA KING, and PATRICIA HOFF,	)	
Appellants,	)	**No. SC85225**
v.	)	
CLARK HUNTER, Morgan County Collector, MORGAN COUNTY R-II SCHOOL DISTRICT and JEREMIAH NIXON, Attorney General of the State of Missouri,	)	
Respondents.	)	

APPEAL FROM THE CIRCUIT COURT OF MORGAN COUNTY
TWENTY-SIXTH JUDICIAL CIRCUIT
The Honorable Mary Dickerson, Judge

SUBSTITUTE BRIEF OF RESPONDENT MORGAN COUNTY R-II SCHOOL DISTRICT

ALEX BARTLETT, #17836
HUSCH & EPPENBERGER, LLC
235 East High Street
Post Office Box 1251
Jefferson City, Missouri 65102
Phone: 573-635-9118
Fax: 573-634-7854
ATTORNEYS FOR RESPONDENT MORGAN COUNTY R-II SCHOOL DISTRICT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases Page

Missouri Constitutional Provisions

Missouri Statutes

Missouri Rules of Civil Procedure

Other Authorities

JURISDICTIONAL STATEMENT

Appellants originally filed a timely appeal with the Missouri Supreme Court. On August 8, 2002, the Missouri Supreme Court in SC84516 on its on motion, found that jurisdiction was vested in the Western District of the Missouri Court of Appeals and ordered the cause transferred pursuant to Article V, Section 11, of the Missouri Constitution.

This is an appeal from a final judgment entered upon motions to dismiss and strike filed by the Respondent Morgan County R-II School District ("School District"). Other Respondents to this action are: (1) Clark Hunter, in his official capacity as the Collector of Morgan County, and (2) Jeremiah Nixon, in his capacity as Attorney General of the State of Missouri. Primarily at issue in this case are Article X, Sections 11(b) and 11(c), and Article X, Section 22(a), of the Missouri Constitution. On November 3, 1998, the voters approved Constitutional Amendment No. 2, which amended, Article X, Sections 11(b) and 11(c), of the Missouri Constitution, and authorized the School Board of the Respondent School District to adopt an operating tax levy of $2.75 without further voter approval. Appellants alleged that the School District adopted an operating tax levy of $2.75 in 2001; that notwithstanding the provisions of Constitutional Amendment No. 2, a lower levy rate was required by the provisions of Section 22, Article X, of the Constitution, adopted in 1980; and that Appellants paid 2001 taxes under protest. Appellants seek tax refunds pursuant to Section 139.031, RSMo, as well as declaratory relief and attorneys fees. See Petition, at L.F. 4-15 and App. Br. A-01 through A-13. The trial court

dismissed the Petition because, *inter alia*, the $2.75 operating tax levy was authorized by Constitutional Amendment No. 2. L.F. 59; App. Br. A-16.

The Supreme Court granted transfer after opinion of the Western District of the Court of Appeals. This Court therefore has jurisdiction of this appeal after transfer pursuant to the provisions of Article V, Section 10, Missouri Constitution.

STATEMENT OF FACTS

Appellants' Statement of Facts does not provide enough detail regarding Appellants' Petition, the School District's Motions, and the Trial Court's Judgment for this Court to understand the issues before it. Therefore, it is necessary for the School District to set forth its own Statement of Facts in this Brief.

Constitutional Provisions.

Constitutional provisions for consideration with respect to this appeal are Article X, Sections 11(b), 22(a), and 23, of the Missouri Constitution.

Article X, Sections 11(b) and 11(c), Missouri Constitution.

During the First Regular Session of the 89th General Assembly in 1997, the General Assembly adopted House Joint Resolution No. 9 ("HJR 9") which submitted to the voters amendments to Section 11(b) and 11(c) and a new Section 11(g) of Article X to the voters. A copy of HJR 9 is set forth in the Appendix to this Brief at A-37. The new Section 11(g), which is set forth in Section B of HJR 9 and which relates to the Kansas City School District, was submitted to the voters of Missouri on April 7, 1998, and was adopted. Amendments to Sections 11(b) and 11(c), which are set forth in Section A of HJR 9, were submitted to the voters as Constitutional Amendment No. 2 at the general election on November 3, 1998, and were adopted by the voters. Constitutional Amendment No. 2 received the approval of the voters in both Morgan County and Moniteau County where the School District is located. See, *Official Manual of Missouri, 1999-2000*, at page 581.

Provisions pertinent to school districts which are set forth in Section 11(b) of Article X of HJR 9, showing deleted language in brackets and new language in bold which were adopted in 1998, are as follows:

> "Section 11(b). Any tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates:
>
> * * *
>
> For school districts formed of cities and towns, including the school district of the city of St. Louis—[one dollar and twenty-five] **two dollars and seventy-five** cents on the hundred dollars assessed valuation;
>
> For all other school districts—sixty-five cents on the hundred dollars assessed valuation."

Provisions of Section 11(c) of Article X of HJR 9, showing deleted language in brackets and new language in bold which were adopted in 1998, are as follows:

> "Section 11(c). In all municipalities, counties and school districts, the rates of taxation as herein limited may be increased for their respective purposes [for not to exceed four years,] when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor; provided in school districts the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed [three times the limit herein specified and not to exceed one year] six dollars on the **hundred dollars assessed valuation**,

except as herein provided, when the rate [period of levy] and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor; [provided in school districts in cities of seventy-five thousand inhabitants or over the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed three times the limit herein specified and not to exceed two years, except as herein provided, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor;] provided, that in any school district where the board of education is not proposing a higher tax rate for school purposes, the last tax rate approved shall continue and the tax rate need not be submitted to the voters; provided, that in school districts where the qualified voters have voted against a proposed higher tax rate for school purposes, then the rate shall remain at the rate approved in the last previous school election except that the board of education shall be free to resubmit any higher tax rate at any time; provided that any board of education may levy a lower tax rate than approved by the voters as authorized by any provision of this section; and provided, that the rates herein fixed, and the amounts by which they may be increased may be further limited by law; and provided further, that any county or other political subdivision, when authorized by law and within the limits fixed by law, may levy a rate of taxation on all property subject to its taxing powers in excess of the rates

herein limited, for library, hospital, public health, recreation grounds and museum purposes."

Article X, Sections 22(a) and 23, Missouri Constitution.

On November 4, 1980, the voters adopted Article X, Sections 16 through 24, of the Missouri Constitution. The constitutional provisions are commonly referred to as the Hancock Amendment. Article X, Section 22(a), of the Missouri Constitution ("Article X, Section 22(a)") provides, in pertinent part:

> "Counties and other political subdivisions are hereby prohibited from . . . increasing the current levy of an existing tax, license or fees, above that current levy authorized by law or charter when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon. . . . If the assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the general price level from the previous year, the maximum authorized current levy applied thereto in each county or other political subdivision shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the general price level, as could have been collected at the existing authorized levy on the prior assessed value."

Article X, Section 23, of the Missouri Constitution ("Article X, Section 23") provides:

> "Notwithstanding other provisions of this constitution or other law, any taxpayer of the state, county, or other political subdivision shall have

> standing to bring suit in a circuit court of proper venue . . . to enforce the provisions of sections 16 through 22, inclusive, of this article and, if the suit is sustained, shall receive from the applicable unit of government his costs, including reasonable attorneys' fees incurred in maintaining such suit."

Appellants' Petition.

On January 14, 2002, Appellants Thomas G. (Jerry) Thompson, Nancy S. Thompson, Richard Montgomery, James R. Campbell, Barbara Campbell, M. Scot Hausman, Stacy Hausman (Hausman Trust), William M. McDaniel, Ralph C. McDaniel, Stanley (Liston) King, Martha King, and Patricia Hoff ("Appellants") filed their "Petition For Declaratory Judgments, Tax Refunds." L.F. 4. They named the School District, the Morgan County Collector, and the Missouri Attorney General as Defendants. L.F. 4. Appellants alleged that they were all taxpayers owning property subject to the operating levy property tax rate of the School District and had paid their 2001 property taxes under protest. L.F. 5. A complete copy of Appellants' Petition is set forth in the Appendix to this Brief at A-1.

General Allegations.

Appellants in their Petition alleged that the School District adopted operating tax levies of $2.67 per $100 assessed valuation in 1998,[1] $2.67 in 1999, $2.75 in 2000 and $2.75 in 2001. L.F. 7-8; App. Br. A-05-06.

The Petition appears to attempt to generally allege that notwithstanding the voter approval of Constitutional Amendment No. 2 which authorizes the school board of a school district to adopt a $2.75 levy without further voter approval, the School District nevertheless violated Section 22(a) of the Hancock Amendment by adopting the $2.75 levy in 2001.

The Appellants allege that the total locally assessed valuation of property within the School District "increased from $133,350,583 in tax year 2000 to $154,544,577 in tax year 2001, an increase of approximately sixteen percent"; and that the "consumer product index change, from 2000 to 2001, was 3.3%". L.F. 8; App. Br. A-06. There is no allegation concerning any increased assessed valuation in 2000 from the preceding year or for any prior year going back to 1980 when the Hancock Amendment was adopted.

---

[1] The School District's operating tax levy rate for 1998 was at issue in *King v. Morgan County R-II School District*, which was decided by the Opinion issued in *Green v. Lebanon R-III School District*, 87 S.W.3d 365 (Mo. App. W.D. 2002) ("*Green II*"). That opinion denied any tax refund or any declaratory relief with respect to the 1998 tax levy of the Morgan County R-II School District because the petition asserting that claim was not filed before December 31, 1998.

There is no allegation in the Petition relative to what part of any increased valuation between the 2000 and 2001 tax years was attributable to "the value of new construction or improvements" as those terms are used in Section 22(a) of the Hancock Amendment. Similarly, there is no allegation with respect to "the value of new construction or improvements" contained with the total assessed valuation of property within the District beginning in 2000 or any prior year going back to 1980 when the Hancock Amendment was adopted.

There is no allegation in the Petition relative to the increase or decrease of the "general price level" as that term is used in Section 22(a) of the Hancock Amendment in 2000 from the preceding year or any prior year going back to 1980 when the Hancock Amendment was adopted.

There is no allegation in the Petition relative to the "current levy of an existing levy" of the School District "when this section [22(a) was] . . . adopted [on November 4, 1980]" which is the starting point of any alleged violation of Section 22(a) of the Hancock Amendment, nor is there any allegation with respect to any subsequent voter approval of a higher levy (or lack of voter approval) except the approval given by voters to a $2.75 operating levy for school districts when Constitutional Amendment No. 2 was adopted in 1998.

Tax Refund Claims – Count IV.

In Count IV of the Petition the Appellants allege that they "have paid their 2001 property taxes to Defendant Collector under protest that the School District's tax rate was in excess of that permitted by law" and that the "School District's 2001 tax rate of $2.75

was in excess of that permitted by law". ¶¶ 45-46, L.F. 14; App. Br. A-12. The Appellants then allege that they "have paid their taxes under protest pursuant to §139.031 RSMo. . . ." ¶ 47, L.F. 14; App. Br. A-12. Appellants do not allege the amounts of refunds which they claim, nor do they plead with any more specificity compliance with the conditions precedent to maintaining a tax refund action under Section 139.031, RSMo. L.F. 14; App. Br. A-12.

The prayer to Count IV asks that "it be determined that the $2.75 School Property Tax rate for 2001 be determined excessive, that judgment for refund and/or credit be entered in favor of Plaintiff Taxpayers. . . ." L.F. 14; App. Br. A-12. The prayer to Count IV does not request an award of attorneys' fees. L.F. 14; App. Br. A-12.

Declaratory Relief – Count I.

Appellants capsulize the declaratory relief which they seek in Count I by the title or heading for Count I:

> "Declaratory Judgment as to whether Proposition 2 [Constitutional Amendment No. 2] Authorized Levy Rate Increases Up To $2.75 Without the Necessity of an Affirmative Vote". L.F. 9; App. Br. A-07.

Appellants allege in Count I that a tax rate of $2.75 "exceeds its [the School District's] maximum authorized current levy".[2] The prayer to Count I then prays that the Court declare that the provisions of Constitutional Amendment No. 2 "did not override the provisions of §§ 22 of Article X of the Missouri Constitution, that § 22 of Article X since January 1, 1999, has still required voter approval to authorize a school property tax rate higher than that required by § 22[3] of Article X in the absence of voter approval. . . ." L.F. 10; App. Br. A-08. The prayer then asks the Court to declare "what the maximum permissible property tax rate of the Defendant School District was for 2001" and "for an

---

[2] This Court in *Green v. Lebanon R-III School District*, 13 S.W.3d 278 l.c. 281-282 (Mo. banc 2000) ('*Green I*'), stated that the "maximum authorized current levy under article X, section 22(a) is the higher of the amount in effect at the time that section was adopted, November 4, 1980, or the highest amount approved by the voters since that date". *Id*. at 281. This Court found and concluded in *Green I* that the highest current tax levy in effect in the Morgan County R-II School District subsequent to 1980 was $3.15 (*Id*. 282, 283), of which judicial notice may be taken. Consequently, the "maximum authorized current levy" as that term is used in Section 22(a) of Hancock has been judicially determined to be in excess of $2.75.

[3] As noted in the preceding footnote, the "maximum authorized current levy" (the language which is used in § 22(a)) under § 22 has been determined in *Green I* to be $3.15, a figure which is in excess of $2.75.

award of costs and attorneys fees pursuant to § 23 of Article X of the Missouri Constitution". L.F. 10; App. Br. A-08.

Declaratory Relief – Count II.

Appellants capsulize the declaratory relief which they seek in Count II by the title or heading for Count II:

> "Declaratory Judgment as to whether Proposition 2 [Constitutional Amendment No. 2] Negates the Applicability of Section 22 of Article 10 When Valuation Growth Exceeds Inflation Growth." L.F. 10; App. Br. A-08.

Appellants in Count II allege in ¶ 28 that "[a]ssuming for purposes of this Count I (sic) is determined adverse to Plaintiff Taxpayers, there **then** is an issue between the Plaintiff Taxpayers and the Defendant School District as to whether, in years **following 1999** the provisions of § 22 . . . remain in force, or whether, when valuation increases greater than inflation increases, § 22 . . . requires an operating levy reduction in the absence of voter approval" (emphasis added). L.F. 10; App. Br. A-08. Count II then restates that the local assessed valuation of property in the "School District increased from $133,350,583 in tax year 2000 to $154,544,557 in tax year 2001", an increase of approximately 16%. There is no allegation with respect to what part of the "growth" was attributable to "new construction and improvements". It is next alleged that "the rate of

inflation, or consumer product index change,"[4] from 2000 to 2001 was" 3.3%. L.F. 11; App. Br. A-09. No factual allegations are set forth in Count II (or incorporated by reference) with respect to any other factors for the 2001 year and prior years going back go 1980 which are necessary in order to make a reassessment rollback computation pursuant to Section 22(a).

The prayer to Count II requests the Court to declare that the provisions of Constitutional Amendment No. 2 "did not override the provisions of § 22 of Article X . . ., that in any year after 1999 when the assessed valuation growth of property within a school district exceeds the change in the rate of inflation, the School District is required by Section 22 . . . to reduce its tax rate below $2.75, absent approval of a higher tax rate," and for attorneys fees and costs pursuant to Section 23 of Article X. L.F. 12; App. Br. A-10.

Declaratory Relief – Count III.

Appellant capulizes the declaratory relief which they seek in Count III by the title or heading for Count III:

[4] Section 22(a) does not use the terms "rate of inflation" or "consumer product index change". Instead, Section 22(a) uses the term "general price level" which is defined in Section 17(3) of Article 10 to mean "the Consumer Price Index for All Urban Consumers for the United States, or its successor publications, as defined and reported by the United States Department of Labor, or its successor agency."

"Declaratory Judgment as to whether Chapter 163 RSMo requires Loss or Reduction in State Aid when Section 22 of Article 10 requires a Levy Reduction". L.F. 12; App. Br. A-10.

Appellants allege in Count III that the School District has asserted that if it lowers its levy below $2.75 the School District will lose state aid and its accredited status by reason of the provisions of Chapter 163, RSMo, and Appellants then reference the provisions of Sections 163.015.2, 163.021.2, 163.023 and 163.025.1. See Petition, ¶¶ 36-43; L.F. 12-13; App. Br. A-10-11. Appellants allege that if "a school district is required to reduce its operating levy below $2.75 by operation of § 22 . . ., there will be no loss of state aid, no loss of increased state aid, and no loss of accredited classification." L.F. 13; App. Br. A-11.

Appellants in the prayer to Count III then "request the Court to declare that whenever **a** School District is required by the provisions of § 22 . . . to reduce its operating levy below $2.75 that there will be no loss of state aid, no loss of increased state aid and no loss of accredited classification for **such** School District by reason of an operating levy of less than $2.75" (emphasis added). Appellants in the prayer to Count III then request "an award of costs pursuant to § 23 of Article X". L.F. 14; App. Br. A-12.

Request for Attorneys Fees – Count V.

Although the Appellants prayed for an award of attorneys fees and costs in the prayers to Counts I, II and III pursuant to Section 23 of Article X of the Missouri Constitution, they again request attorneys fees and costs with respect to those counts in Count V of their Petition, as well as attorneys fees and costs with respect to Count IV,

pursuant to Section 23 of Article X, "[i]f counts I, II, III or IV are sustained". L.F. 15; App. Br. A-13.

Motion to Dismiss of the Attorney General.

The Attorney General filed a motion requesting that he be dismissed as a party. The Attorney General asserts that because (1) the Appellants had not challenged the constitutionality of a statute but merely an interpretation of constitutional provisions and a statute and (2) taxpayers are not allowed to sue the Attorney General and have an adequate remedy at law, the Attorney General should be dismissed. L.F. 16.

The School District's Motions to Dismiss or in the Alternative to Strike.

On March 13, 2002, the School District filed its "Motions with Respect to Plaintiffs' 'Petition For Declaratory Judgements, Tax Refunds'" ("School District's Motions"). L.F. 20. The School District included five different motions – one directed to each of Appellants' Counts. L.F. 20-32. In each Motion, the School District requested that the Court dismiss the Count for failure to state a claim. In the alternative, the School District asked the Court to strike (a) Appellants' requests for declarations, (b) Appellants' claims for attorneys' fees, and (c) any monetary claims.

As to Counts I and II, the School District asserted that Appellants had not shown that the School District violated Article X, Section 22(a), when it raised is levy. L.F. 21. L.F. 21. The School District stated Appellants' claims were barred because they did not challenge the $2.75 rate in 2000 when the School District first raised its rate to $2.75. L.F. 20-27. The School District also asserted that claims for the 1999, 2000, and 2001 tax years were barred because they were not brought before the taxes were due and pay-

able. L.F. 20-27. Moreover, the School District asserted that there was no real controversy between the parties because, as a matter of law, Article X, Section 11(b), controls over Article X, Section 22(a). L.F. 20-27.

As for Count III, the School District asserted that Appellants had failed to show that there was a justiciable controversy regarding whether Article X, Section 11(b), should prevail over the provisions of Article X, Section 22(a) and, as a result, there was no need for the School District to lower its tax rate below $2.75. L.F. 28-29. Consequently, the School District stated that the issue of whether the School District would lose state aid or accreditation if forced to lower its tax rate below $2.75 is a hypothetical question not ripe for review. L.F. 28-29. The School District also asserted that Appellants lacked standing to bring the Count. L.F. 28-29.

For Count IV, the School District asserted that Appellants' allegations were not specific enough to set forth a claim for a tax refund pursuant to Section 139.031, RSMo, and that Appellants' claims were barred by the doctrine of sovereign immunity. L.F. 29-30. The School District also incorporated all of the grounds set forth in its Motions addressing Counts I and II of Appellants' Petition. L.F. 29-30.

Finally, for Count V, the School District asserted that any relief Appellants might secure would have to be pursuant to Section 139.031, RSMo and that Section 139.031 does not afford attorneys' fees to a successful litigant. L.F. 31. The School District further asserted that Article X, Section 23, only allows attorneys' fees when a plaintiff brings suit to enforce the provisions of the Hancock Amendment and are successful. L.F. 31. The School District stated that inasmuch as Appellants did not seek injunctive

relief to "enforce" the provisions of the Hancock Amendment, but rather sought declaratory and other relief, Appellants were not entitled to attorneys' fees under Section 23, Article X. L.F. 31.

Judgment Entered by the Trial Court[5]

On April 8, 2002, the parties appeared before the Trial Court. The Court dismissed the Attorney General from the action. L.F. 2. The School District presented its Motions to the Court and the Court entered its Judgment in this matter. L.F. 2-3. The Court held:

> "2. The Court determines that at the time of the filing of the Petition herein it was too late for the Plaintiffs to assert claims with respect to the property taxes for the 1999 and 2000 tax years. See, *Koehr v. Emmons*, 55 S.W.3d 859 (Mo. App. 2001); Concurring Opinion of Judge Wolff in *Green v. Lebanon R-III School District*, 13 S.W.3d 278, 281 (Mo. 2000); and Judgment entered in January 18, 2002, by the Honorable George M. Flanigan, Special Judge, in *King v. Morgan County R-II School District*, Case No. CV100-513CC, Camden County Circuit Court. Furthermore, because the claims were not timely asserted, no justiciable controversy exists and no action for declaratory judgment will lie. *Dirck v. State of Missouri,* 665 S.W.2d 615 (Mo. banc 1984). Consequently, all claims with respect to

[5] A copy of the Trial Court's Judgment is set forth in the Appendix to this Brief at A-14.

property taxes for the 1999 and 2000 tax years which are asserted in the Petition are stricken and dismissed."

L.F. 41-42.

"3. Plaintiffs also have asserted claims with respect to the property taxes for the 2001 tax year. Inasmuch as those claims were not asserted until after those taxes became due and payable, all claims which the Plaintiffs might have with respect to property taxes for the 2001 tax year, with the exception of any claims which were properly lodged and preserved pursuant to the provisions of Section 139.031, RSMo, hereinafter discussed, are also untimely and are hereby stricken and dismissed.

L.F. 42.

"4. Plaintiffs in their Petition refer to the provisions of Proposition No. 2 which the voters of Missouri approved at the general election in 1998 and which amended Section 11 of Article X of the Missouri Constitution. By reason of the adoption of Proposition No. 2, the voters of Missouri authorized the Morgan County R-II School District to adopt an operating tax levy of up to $2.75 per $100.00 of assessed valuation, without voter approval. Because Proposition No. 2 authorized the School District to adopt an operating tax levy of up to $2.75 without voter approval, the Plaintiffs are not entitled to the relief which they seek in their Petition. All claims set forth in the Petition are therefore ordered stricken and dismissed."

L.F. 42.

> "5. The Court also finds and determines that the Plaintiffs have not stated claims for tax refunds pursuant to Section 139.031, RSMo, with sufficient specificity in their Petition to be able to maintain an action or actions for tax refunds pursuant to Section 139.031, RSMo. Consequently, the Court finds and determines that all claims which purport to be predicated upon or asserted pursuant to the provisions of Section 139.031, RSMo, be and the same are hereby stricken and dismissed."

L.F. 42-43.

> "6. The Court further finds and determines that under the allegations of the Petition the Plaintiffs are not entitled to recover attorneys fees and costs. All claims of the Plaintiffs for attorneys fees and costs are therefore stricken and dismissed."

L.F. 43.

> "7. The Court finds, determines and concludes that all claims of the Plaintiffs set forth in their Petition against the Defendants be and are hereby dismissed."

L.F. 43.

Interests of *Amici Curiae* Supporting the Appellants.

Two Briefs have been filed by *Amici Curiae* aligned with the Appellants. We discuss briefly the interests of those *Amici*. One Brief has been filed by Amici David C. Humphreys and Tamko Roofing Products, Inc. The other Brief has been filed by *Amici*

Associated Industries of Missouri and Missouri Chamber of Commerce & Industry. Both *Amici* Briefs have been engendered by David C. Humphreys or his attorneys.

Mr. Humphreys is an attorney and is the CEO of Tamko Roofing Products, Inc. ("Tamko"). Tamko is a closely held family owned corporation. Tamko is based in Jasper County, Missouri, but it now has business operations throughout the United States. Mr. David Humphreys is the third generation of the family owning and running Tamko. See Tamko web site at http://www.tamko.com/about.htm.

On March 7, 2003, Mr. Humphreys, his wife, his mother, Tamko and other entities which he controls commenced an action in the Jasper County Circuit Court, styled "*David C. Humphreys, v. Ronald C. Mosbaugh, et al*.", Case No. 03CV680239 (the "*Humphreys* Lawsuit"). The *Humphreys* Lawsuit was filed not long after the Western District of the Missouri Court of Appeals issued its Opinion in this case.

The First Amended Petition in the *Humphreys* Lawsuit is similar in many respects to the Petition in this case, though there has been an attempt to make it significantly more grandiose (and, in the process, more litigation costs to be engendered) than in this case. In the *Humphreys* Lawsuit, the following taxing districts and officials have been joined as Defendants:

1. Ronald C. Mosbaugh, as Jasper County Clerk
2. Stephen H. Holt, as Jasper County Collector
3. Donald Davis, as Jasper County Assessor
4. County Board of Equalization for Jasper County

5. Claire McCaskill, as State Auditor

6. Joplin R-VIII School District

7. Webb City R-VII School District

8. City of Joplin

9. Carterville Special Road District

10. Webb City Special Road District

11. Jasper County Commission

12. Duenwig Fire Protection District

13. Joplin Special Road District

The Plaintiffs in the *Humphreys* Lawsuit seek real property tax refunds for themselves with respect to 2002 property taxes. The *Humphreys* Plaintiffs also seek to have a class certified consisting of all real property taxpayers in Jasper County. Counsel for the Plaintiffs in the *Humphreys* Lawsuit are the same counsel as filed the *Humphreys/Tamko Amicus* Brief in this Court. Because of the undersigned attorney's experience with the *Green* and *King* cases and this case, he is acting as counsel for the Joplin School District and the Webb City School District along with Malcolm L. Robertson of the firm of Blanchard, Robertson, Mitchell and Carter, PC, of Joplin. Instead of setting forth the interests of the Joplin School District and the Webb City School District in another Brief (with more paper), the undersigned has opted to briefly explain that litigation and the interests of the School Districts.

The "opening shot" of discovery in the *Humphreys* Lawsuit (which has been temporarily stayed pending a hearing on August 26, 2003), for example, requests each De-

fendant to produce all assessment appraisals and tax bills for each tract of real property in Jasper County. Because of the Potential expense involved, some of the smaller taxing districts named as Defendants are already throwing up their "hands".

Mr. Humphreys is no stranger to litigation. See, "*David Humphreys v. Main Street Joplin, Inc. and the City of Joplin*", Case No. 00-5029-CV-SW-4, United States District Court for the Western District of Missouri, Southwestern Division. See docket entries, filings and Orders on-line at https://ecf.mowd.uscourts.gov, with document numbers hereinafter noted being those which appear on the on-line docket sheets. Mr. Humphreys brought suit against Main Street Joplin, Inc., a not-for-profit corporation which operated under contract with the City of Joplin, alleging federal constitutional violations and other claims with respect to parking tickets being issued to Mr. Humphreys. After the Honorable Gary Fenner, United States District Judge, dismissed the Plaintiff's substantive due process claim, but not others (Court Doc. #25), and after considerable discovery, a settlement was reached which included a settlement class being certified. The end result was that refunds totaling $1,448 were made with $585 of that amount going to Mr. Humphreys (Court Doc. #74) and $60,000 in attorneys fees went to Plaintiff's counsel (Court Doc. #70).

Consequently, the Joplin School District and the Webb City School District have a vital interest in this Court reaching the merits in this case and also in minimizing the litigation costs in the *Humphreys* Lawsuit.

POINTS RELIED ON

I.

The Trial Court Did Not Err In Dismissing The Plaintiffs' Petition Inasmuch As Constitutional Amendment No. 2 Amending Article X, Sections 11(b) and 11(c) Of The Missouri Constitution Adopted By A Vote Of The Voters Of Missouri Authorized The Board Of The Respondent School District To Impose An Operating Tax Levy Of $2.75 Without Further Voter Approval.

Constitutional Amendment No. 2 amending Article X, Sections 11(b) and 11(c), Missouri Constitution, Adopted by the Voters of Missouri, November 3, 1998

Goode v. Bond, 652 S.W.2d 98 (Mo. banc 1983)

Fischer v. Reorganized School District No. R-V of Grundy County, 284 S.W.2d 516 (Mo. banc 1955)

State ex rel. McKittrick v. Bode, 113 S.W.3d 805 (Mo. banc 1938)

II.

The Judgment Of The Trial Court Dismissing The Claims Of Appellant For Declaratory Relief Should Be Affirmed Because (1) Appellants Have An Adequate Remedy At Law For Recovery Of 2001 Taxes Paid Under Protest Pursuant To Section 139.031, RSMo, (2) No Justiciable Controversy Separate And Apart From Appellants' Refund Claims Pursuant To Section 139.031, RSMo, Exists With Respect To The Lawfulness Of The Respondent School

District's 2001 Tax Levy, (3) No Justiciable Controversy Exists With Respect To The Lawfulness Of The Respondent School District's Tax Levies For The 1999 And 2000 Tax Years, (4) The Appellants Do Not Have A Legally Protectable Interest At Stake With Respect To The Lawfulness Of The Respondent School District's Tax Levies For The 1999 And 2000 Tax Years And (5) With Respect To Appellants' Request In Count III For A Declaration With Respect To A Loss Or Reduction Of State Aid, No Justiciable Controversy Exists And The Issue Is Not Ripe For Determination.

Missouri Soybean Association v. The Clean Water Commission, 102 S.W.3d 10 (Mo. banc 2003)

Goode v. Bond, 652 S.W.2d 98 (Mo. banc 1983)

Dirck v. State, 665 S.W.2d 615 (Mo. banc 1984)

Koehr v. Emmons, 98 S.W.3d 580 (Mo. App. E.D. 2002)

III.

In The Alternative To Point I, The Trial Court Properly Dismissed The Tax Refund Claims Of The Appellants Because Of The Failure Of The Appellants To Allege With Specificity Their Compliance With The Requirement Of Section 139.031, RSMo, So As To State Claims For Tax Refunds.

Section 139.031, RSMo

Boyd-Richardson Company v. Leachman, 615 S.W.2d 46 (Mo. banc 1981)

Metal Form Corporation v. Leachman, 599 S.W.2d 922 (Mo. banc 1980)

Pac-One, Inc. v. Daly, 37 S.W.3d 278 (Mo. App. E.D. 2000)

IV.

Alternatively, In Response To Appellants' Points I, II, III, IV And V, The Trial Court Did Not Err In Dismissing Counts I, II, III, IV And V Of Appellants' Petition Because Appellants Have Failed To Show A Potential Violation Of Article X, Section 22(a), By The School District Setting Its Operating Levy At $2.75 In That The Missouri Supreme Court Has Already Determined That The School District's "Maximum Authorized Current Levy" Under Article X, Section 22(a), Is $3.15.

Green v. Lebanon R-III School District, 13 S.W.3d 278 (Mo. banc 2000)

Williams v. Rape, 990 S.W.2d 55 (Mo. App. W.D. 1999)

Sympson v. Rogers, 314 S.W.2d 717 (Mo. 1958)

V.

The Trial Court Did Not Err In Dismissing Count V Of Appellants' Petition Because In Order For A Taxpayer To Recover Attorneys' Fees Pursuant To Article X, Section 23, The Suit Must Be Successful And The Suit Must Have Been Brought To "Enforce" The Provisions Of Article X, Section 16 Through 22(a).

Webstser's New Twentieth Century Dictionary of The English Language, Unabridged, 602 (2nd ed. 1979)

Metts v. City of Pine Lawn, 84 S.W.3d 106 (Mo. App. E.D. 2002)

ARGUMENT

I.

The Trial Court Did Not Err In Dismissing The Plaintiffs' Petition Inasmuch As Constitutional Amendment No. 2 Amending Article X, Sections 11(b) and 11(c) Of The Missouri Constitution Adopted By A Vote Of The Voters Of Missouri Authorized The Board Of The Respondent School District To Impose An Operating Tax Levy Of $2.75 Without Further Voter Approval.

Standard of Review

The trial court, upon motions to dismiss or strike, determined that the claims of Appellant for declaratory relief were not justiciable; determined that the Respondent School District was authorized by Constitutional Amendment No. 2 to adopt an operating tax levy of $2.75 so no claims would lie based upon an operating tax levy of $2.75 being excessive; alternatively, found that claims for refund of taxes under the provisions of Section 139.031, RSMo, were not stated with sufficient specificity to state a claim; determined that under the allegations of the Petition that Plaintiffs were not entitled to recover attorneys fees; and dismissed all claims. L.F. 41; App. Br. A-15.

The determination that the declaratory relief claims were not justiciable was in effect a dismissal for lack of jurisdiction. *Missouri Soybean Association v. The Clean Water Commission*, 102 S.W.3d 10 (Mo. banc 2003). The standard for review with respect to a trial court's dismissal for lack of jurisdiction is that "[t]his Court will affirm the trial court's judgment unless there is no substantial evidence to support it, unless the

decision is contrary to the weight of the evidence, or unless the trial court erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Constitutional interpretation is an issue of law that this Court reviews *de novo*." *Farmer v. Kinder*, 89 S.W.3d 447, l.c. 449 (Mo. banc 2002).

If the action of the trial court is viewed as a dismissal for failure to state a claim, the standard for review is slightly different. In affirming a dismissal of a tax refund claim for failure to state a claim, the Eastern District of the Missouri Court of Appeals in *Missouri American Water Company v. Collector of St. Charles County*, 103 S.W.3d 266, 268 (Mo. App. E.D. 2003), enunciated the standard of review test set forth in *Nazeri v. Missouri Valley College*, 860 S.W.2d 303 (Mo. banc 1993), in the following manner – "Because this is an appeal from the grant of a defendant's motion to dismiss for failure to state a claim, we accept as true all well-pled allegations in American Water's petition and liberally grant it all reasonable inferences drawn therefrom. * * * A motion to dismiss for failure to state a claim is solely a test of the plaintiff's petition. * * * We do not attempt to weigh whether alleged facts are credible or persuasive. * * * 'Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.' [quoting from *Nazeri* at page 306]."

Argument

The Appellants, as Plaintiffs below, attempt to emasculate the plain meaning of Constitutional Amendment No. 2, approved by the voters of Missouri in 1998, providing that the school board of any school district containing a city or a town (which includes

the Morgan County R-II School District) may adopt an operating tax levy of $2.75 without further voter approval.

The voters of Missouri in adopting Constitutional Amendment No. 2 gave "voter approval" by amending Section 11(b), Article X, Missouri Constitution, for school boards of school districts containing cities or towns to adopt an operating tax levy of $2.75 without any further voter approval being required. There are no "ands", "ifs", "buts" or "maybes" to the constitutional language in Section 11(b). By also amending Section 11(c) of Article X which sets forth the parameters for voter approval of school district operating levies, Constitutional Amendment No. 2 made clear that no further voter approval was to be required for a school district such as the Respondent Morgan County R-II School District at Versailles to adopt an operating levy of up to $2.75.

This Court has recognized from shortly after the Hancock Amendment was adopted in 1980 that a central feature of Hancock was voter approval and it mattered not how that was granted – and once the imposition of a tax was approved by the voters, no further voter action was required to exempt the taxes so authorized from further limits within the Hancock Amendment.

In November of 1982, two years after the adoption of the Hancock Amendment to the Constitution, the voters of Missouri adopted Proposition C as a statute which provided for a one-cent sales tax for educational purposes. The contention was made by the Plaintiffs in *Goode v. Bond,* 652 S.W.2d 98 (Mo. banc 1983), that because the Proposition C initiative was a statutory enactment rather than a constitutional amendment modifying the Hancock Amendment provisions, there had been no amendment of the Hancock

provisions in the Constitution and therefore the revenues raised by Proposition C had to be included within the revenue limit provisions of Section 18 of Article X, Missouri Constitution. This Court in *Goode* rejected that contention, and in doing so pointed to Section 16 of Article X:

> "Because the first sentence of the **Hancock** Amendment, Article X, § 16, **excludes those increases** [the Proposition C one-cent sales tax increase] **in taxes receiving voter approval from the limitations** contained in § 18, and **Proposition C received such approval**, we **take judicial notice** that there is **no justiciable controversy** between the parties and dismiss the appeal." (emphasis added).

Section 16 is the introductory or purpose section of the Hancock Amendment and has application to Section 22(a) of Hancock just as it does to Section 18 setting forth the state revenue limit.

All of the relief which Appellants request in this action is predicated upon an assumption that even though Constitutional Amendment No. 2 authorizing a school district to impose an operating levy of $2.75 per $100 assessed valuation was approved by the voters of Missouri, including a majority of the voters in Morgan and Moniteau Counties where the School District is located, the voters of the School District must nevertheless again approve a $2.75 operating levy. *Goode* teaches that statewide voter approval is effective to remove Hancock Amendment limitations, even without any specific amendment of the Hancock provisions. Because the School Board of the School District was authorized to levy a $2.75 operating levy by the voter approval given by the voters of

Missouri to Constitutional Amendment No. 2, all of the Appellants' claims in their Petition which are predicated upon Constitutional Amendment No. 2 are not justiciable and must fail. *Goode, supra*.

In *Green v. Lebanon R-III School District*, 13 S.W.3d 278 (Mo. banc 2000) ("*Green I*"), this Court first considered Constitutional Amendment No. 1. In *Green I* the school districts asserted that Constitutional Amendment No. 2 should be construed to apply to the 1998 property taxes so as to foreclose any tax refunds for the 1998 tax year because the 1998 operating levies in question did not exceed $2.75. The Supreme Court's Opinion declined to apply Constitutional Amendment No. 2 to the 1998 taxes, but clearly held that a $2.75 levy may be imposed by a school district after 1998 without voter approval.

The Court's Opinion in *Green I* reasoned with respect to Constitutional Amendment No. 2:

> "Finally, the schools contend that the taxpayers are not entitled to a refund for the 1998 tax year under either article X, section 22(a) or section 137.073, RSMo, because Constitutional Amendment Number 2 permits the levies in these cases. The amendment modified article X, section 11(b), which now reads,
>
> "'Any tax imposed upon such property . . . shall not exceed the following annual rates [without a vote, as specified in article X, section 11(c)]: . . . For school districts formed of cities and towns, including

the school district of the City of St. Louis – two dollars and seventy-five cents on the hundred dollars assessed valuation.'

"**Section 11(b) addresses the amount of tax that a political subdivision may levy without voter approval**. * * *

"The amendment does not apply. School districts set the levies for 1998 not later than September 1, 1998. *See* sections 164.011.2, 67.110.1, RSMo. The voters did not adopt the amendment, however, until November 3, 1998, and the amendment did not become effective until December 3, 1998. Mo. Const. Art. XII, section 2(b). The schools set the 1998 levies and the levies became official, therefore, before the effective date of the amendment. If the school district imposed an unlawful levy for 1998, the later constitutional amendment did not ratify the earlier unlawful tax rate." (Emphasis added).

In *Green I* the 1998 levy was alleged to be "unlawful" because of violations of Section 22(a) of the Hancock Amendment. The Opinion of this Court in *Green I* left no doubt, we submit, that for subsequent years a school district without voter approval could adopt an operating tax levy of $2.75 without respect to the provisions of the Hancock Amendment. That has been the general understanding of school districts, the State Auditor and the Missouri Department of Elementary and Secondary Education.

When Constitutional Amendment No. 2 was placed before the voters of Missouri at the November 3, 1998, General Election, the voters were advised and understood that when they voted for and approved Constitutional Amendment No. 2 they were authoriz-

ing school boards to set operating levies without a vote of the people. The Ballot Title for Constitutional Amendment No. 2 provided:

> "**School board may set** operating **levy** no higher than **$2.75 without a vote**. Voter approval by simple majority required to set levy up to $6.00. Voter approval by two-thirds required to set levy above $6.00." (Emphasis added).

See Appendix C – Ballot Title Language for Constitutional Amendment No. 2 at A-20. Proposition No. 2 was submitted to the voters by action of the General Assembly in 1997. See, Section A of House Committee Substitute for House Joint Resolution No. 9 adopted during the First Regular Session of the 89th General Assembly ("H.J.R. 9"). (Appendix E to this Brief at A-37).[6] "[A] court must undertake to ascribe to the words of a constitutional provision the meaning that the people understood them to have when the provision was adopted. *Boone County Court*, 631 S.W.2d at 324." *Farmer v. Kinder, supra*, 89 S.W.3d at 452. Here, the voters were advised by the Ballot Title and understood when they were voting upon Constitutional Amendment No. 2 that the "**School Board**" would have the authority **to establish** a "**levy**" of "**2.75 without a vote**". This Court should give effect to that understanding. There were no ifs, ands, buts or maybes.

[6] As originally introduced on January 15, 1997, by Representatives Lumpe, Shear, Days, Bray, Van Zandt, Schilling and Lakin, H.J.R. 9 only proposed an amendment to Section 11(b) of Article X to authorize the $2.75 school levy.

In 1993 the General Assembly had enacted Conference Committee Substitute for House Substitute for House Committee Substitute for Senate Substitute for Senate Committee Substitute for Senate Bill No. 380 ("S.B. 380") in response to the January 1993 decision of the Honorable Byron L. Kinder, Cole County Circuit Judge, holding Missouri's school finance system to be unconstitutional. See, *Committee for Educational Equality v. State*, 878 S.W.2d 446 (Mo. banc 1994).

S.B. 380 completely revised Missouri's school foundation formula providing state aid to school districts. The provisions of Section 163.021, RSMo, were revised to require that by the 1994-1995 school year all school districts would impose a minimum operating levy of $2.75 in order to qualify for state aid under the school foundation formula. Amendments were subsequently made to Section 163.021, RSMo, but provision continues to be made for a minimum operating levy of $2.75. It is noted that under the provisions of the school foundation formula as set forth in Section 163.031, RSMo, when a local school district increases its operating levy above $2.75, such generally results in additional state aid.

By amending Section 163.021.2 in SB 380, the General Assembly set forth the following authorization by law to attain a $2.75 operating levy without local voter approval:

> "Pursuant to section 10(c) of article X of the state constitution, a school district may levy the operating levy required by this subsection if such rate does not exceed the **highest rate in effect subsequent to the 1980 tax year**." (emphasis added).

Until Section 163.021.2 was amended in 1996 by Senate Bill Nos. 795, 542 & 563, there was no exception to the foregoing provision because of "adjustments required pursuant to Article X, section 22 of the Missouri Constitution."

By looking to the above-quoted provisions of Section 163.021.2 which were enacted in 1993, most school districts in Missouri were in a position to adopt a levy of $2.75 without voter approval since most school districts had an operating levy of in excess of $2.75 in the early 1980s prior to the rollback provided in Proposition C (which had an effective date of January 1, 1983) and statewide reassessment which did not take

place until 1985.[7] The *1983-84 Report of the Public Schools of Missouri*[8] reflects that of the 545[9] school districts in Missouri only 11[10] had operating tax levies which were less

[7] See, *Forty-Fifth Annual Report of the Proceedings and Decisions of the State Tax Commission of Missouri for the Year Ending December 31, 1990*, page 24, stating that statewide reassessment was implemented in 1985. This Report was published in compliance with Section 138.440, RSMo.

[8] This *Report* was published by the Missouri State Board of Education in compliance with Section 161.092, RSMo. Table II of this Report, beginning at page 91 includes a compilation of the operating tax levy of each school district in Missouri for the year 1983. The *Report* reflects that the Respondent Morgan County R-II School District had an operating tax levy of $3.15 (page 104) and that the Joplin R-VIII School District and the Webb City R-VII School District which *Amici* Humphreys and Tamko target in their Jasper County Circuit Court action had operating levies in 1983 of $3.89 and $3.25, respectively (p. 100).

[9] The 545 school districts do not include two districts which overlap other school districts and which are limited to providing special education, i.e., the Special School District of St. Louis County and the Pemiscot County Special School District.

than $2.75, 16 districts had levies of between $2.75 and $2.99, 323 districts had levies of between $3.00 and $3.99, 157 districts had levies of between $4.00 and $4.99 and 38 districts had levies of $5.00 or more.

There was considerable confusion after the enactment of S.B. 380 in 1993 relative to the $2.75 minimum operating levy requirement of that enactment and the procedures that local school districts should follow in adopting levies to secure state aid. Conflicting advice was given to school districts by the Missouri Department of Elementary and Secondary Education ("DESE") and the State Auditor. See, Memorandum "Senate Bill 380 Information" dated May 27, 1993, in Appendix F to this Brief at A-42, which was distributed to Missouri school districts to explain the requirements of S.B. 380. That transmittal advised that only districts which did not have a voter-approved levy of at least $2.75 after 1980 would have to seek voter approval and did not discuss any Hancock Amendment ramifications. The State Auditor, the Honorable Margaret Kelly, in her June 22, 1993, letter to school district superintendents, however, took a different view advising

---

[10] Of the 11 districts, five were elementary districts, one was the South Callaway R-II School District which has the benefit of the locally assessed valuation arising because of the Union Electric nuclear plant at Reform being within the District and one was the Knob Noster R-VIII School District which received substantial federal aid because of Whiteman Air Force Base being within the District and the District operating a school which is on that Base. None of the 11 Districts had an operating tax levy of less than $2.10.

that any increase in local property taxes would require voter approval. See State Auditor's letter of June 22, 1993, in Appendix F to this Brief at A-52. See also, August 5, 1993, letter of Governor Carnahan in Appendix F to this Brief at A-55 taking issue with the State Auditor's interpretation.

Since DESE administered the distribution of state aid under the new school foundation formula, school districts generally followed the DESE guidelines. In doing so, however, school districts sometimes became subject to criticism and claims based upon positions that had been espoused by the State Auditor. See, e.g., the *Green v. Lebanon R-III School District* litigation.

In putting Constitutional Amendment No. 2 before the voters of Missouri, the General Assembly clearly intended to provide school boards the clear and unequivocal authority and a "safe harbor" of adopting a levy of $2.75 without voter approval. By enacting this straight forward amendment to the Constitution such also obviated the complexities and judicially unprobed shoals of the reassessment rollback provisions of the Hancock Amendment.

H.J.R. 9 was introduced in the House on January 15, 1997. See, House Journal for January 15, 1997, at page 118. As introduced, H.J.R. 9 only amended Section 11(b) of Article X to authorize school districts to adopt $2.75. On January 27, 1997, the Oversight Division of the Committee on Legislative Research issued its Fiscal Note with respect to H.J.R. 9 which stated:

> "**Oversight** notes that school districts must have **a levy of at least $2.75 to qualify for full funding** under the foundation formula and assumes that

raising the rate which may be imposed without a vote to $2.75 would not have a large impact.

* * *

"This proposal would raise the maximum tax levy which school districts formed of cities and towns **could assess without voter approval to $2.75** per one hundred dollars assessed valuation . . . ."

See Fiscal Note of January 27, 1997, set forth in Appendix D at A-22.

Just as there were no changes in the proposed language changing Section 11(b) in H.J.R. 9 as originally introduced, the above-quoted fiscal note explanation remained the same in subsequent fiscal notes with respect to H.J.R. 9 which were issued by the Oversight Division of the Committee on Legislative Research on March 4, 1997, on March 19, 1997, on May 8, 1997, and on May 12, 1997. See Appendix D at A-22. Consequently, throughout the course of passage of H.J.R. 9 in 1997 the members of the General Assembly knew, and it was clearly their intent, that school boards have the authority to adopt an operating levy of up to $2.75 without a vote of the voters within the school district and unfettered by any other existing statutory or constitutional provisions or interpretations of those provisions which might seemingly require a vote under certain circumstances. On final passage, H.J.R. 9 easily passed the Senate with 22 "yeas" and 10 "nays" (see Senate Journal for May 7, 1997, at page 1071) and the House by a vote of 110 "ayes" to 45 "noes" (see House Journal for May 7, 1997, at page 1720). Voter approval was given by the voters of Missouri at the November 3, 1998, general election. It is also noted that Proposition No. 2 received the approval of voters in both Morgan County and in Monit-

eau County where the School District is located. See, *Official Manual of the State of Missouri, 1999-2000*, at page 581.

This Court can and should, we submit, reason as this Court did in *Goode v. Bond, supra*, that under Section 16 of the Hancock Amendment voter approval has been given school boards of school districts to adopt an operating levy of $2.75, and that a school district doing so and levying such taxes is relieved of the limitations contained in Section 22(a) of the Hancock Amendment, just as this Court in *Goode* held that the State would be relieved from any of the limitations of Section 18 of the Hancock Amendment because of the voter approval of the sales taxes raised by Proposition C, a statutory enactment. Because Constitutional Amendment No. 2 amends the Constitution, a much stronger case can here be made for the application of the *Goode* rationale than the statutory authorization contained in Proposition C.

We, nevertheless, address the allegations of Appellants. Appellants have alleged that Constitutional Amendment No. 2 is in direct conflict with Article X, Section 22(a) in two situations. The first situation being when a school district raises its operating levy to $2.75 without a vote of the people when Article X, Section 22(a) would have otherwise required a lower levy unless the voters approved the rate. The second situation occurs after a school district raises its levy to $2.75 and reassessment occurs whereby assessed valuation growth less new construction exceeds the rate of inflation so as Article X, Section 22(a), would require the School District to lower its rate to produce the same amount of revenue as was produced by the $2.75 rate unless the voters approved the $2.75 rate.

The law is well settled that when a direct conflict exists between two constitutional provisions, the courts cannot harmonize inconsistent positions as Appellants advocate – the constitutional provision adopted later in time prevails. In *State ex rel. McKittrick v. Bode*, 113 S.W.2d 805 (Mo. banc 1938), the Missouri Supreme Court addressed how a Court should handle a direct conflict in two constitutional provisions. It stated:

> "We are familiar with the rule that the provisions of the Constitution should be harmonized. However, if said paragraph is unambiguous and in direct conflict with section 10, 'the amendment must prevail because it is the latest expression of the will of the people.' In other words, **we are without authority absent an ambiguity, to resort to interpolation. In this situation, 'the rule as to harmonizing inconsistent provisions' is without application.** The rule is stated as follows: 'Many troublesome questions of constitutional construction arise in the interpretation of constitutional amendments with reference to the earlier constitutional provisions to which they have been added. In accordance with the general rule that harmony in constitutional construction should prevail whenever possible, generally an amended Constitution must be read as whole, as if every part of it had been adopted at the same time as one law. A new constitutional provision adopted by a people already having well-defined institutions and systems of law should not be construed as intended to abolish the former system, except in so far as the old order is in manifest repugnance to

> the new Constitution, but such a provision should be read in the light of the former law and existing system. **Amendments, however, are usually adopted for the express purpose of making changes in the existing system. Hence it is very likely that conflict may arise between an amendment and portions of a Constitution adopted at an earlier time.** In such a case **the rule is firmly established that an amendment duly adopted is a part of the Constitution and is to be construed accordingly. It cannot be questioned that it conflicts with pre-existing provisions. If there is a real inconsistency, the amendment must prevail because it is the latest expression of the will of the people.** In such a case there is no room for the application of the rule as to harmonizing inconsistent provisions. **If it covers the same subject as was covered by a previously existing constitutional provision, thereby indicating an intent to substitute it in lieu of the original, the doctrine of implied repeal, though not favored, will be applied and the original provision deemed superceded.**"

Id. at 808-809 (emphasis added). See also *State ex rel. Lashly v. Becker,* 235 S.W. 1017, 1020 (Mo. banc 1921); *State ex rel. Board of Fund Commissioners v. Holman,* 296 S.W.2d 482, 491 (Mo. banc 1956).

Constitutional Amendment No. 2 was passed on November 3, 1998. Article X, Section 22(a) was passed on November 4, 1980. Therefore, according to *McKittrick*, Constitutional Amendment No. 2 repeals Article X, Section 22(a), to the extent that Arti-

cle X, Section 22(a), prohibits a school district from raising its levy to $2.75 without a vote of the people and to the extent that Article X, Section 22(a), requires a school district to lower its lower its levy to below $2.75 because of changes in assessed valuation unless the voters approve the $2.75 rate.

The Briefs of Appellants and *Amici* Associated Industries and Missouri Chamber both cite *State ex rel. Hirni v. Missouri Pacific Railroad Company*, 27 S.W.367, 369-370 (Mo. 1894), for the premise that Section 11 of Article X was to "limit the expenses of **county government**" (emphasis added). The undersigned counsel is well aware of the *Hirni* case – and its current limited viability. The undersigned counsel briefed and argued, unsuccessfully, before this Court for the Respondent in *Three Rivers Junior College District v. Statler*, 421 S.W.2d 235 (Mo. banc 1967), that *Hirni* controlled, that the Three Rivers Junior College District was a "school district" within the meaning of Section 11, and that the tax levies of the Junior College District and the local school district had to be combined for the purpose of the constitutional limits in Section 11 just as the levies of townships and counties were combined in *Hirni*. The Supreme Court in *Three Rivers Junior College District* refused to apply the restrictive rationale of *Hirni* with respect to limiting "expenses of **county** government" (emphasis added). Instead, Judge Seiler in *Three Rivers Junior College District* reasoned:

> "Here, however, we are dealing with school districts, which have historically been regarded in Missouri as independent, tax-levying powers and were so treated in the 1875 constitution." *Id.* at 241.

It should be remembered, as well, that it was the taxes imposed by counties to attract railroads and fund railroad expansion (which often didn't come to fruition) that gave rise to the tax limitations in the 1875 Constitution – not taxes to pay teachers small salaries or to pay for one-room school houses.

Consequently, because of the rejection of *Hirni* by *Three Rivers* and the expansive reading by the Court in *Three Rivers* of Section 11 as it pertains to school districts, over and above the taxing authority of local school districts, we now have junior college districts, special school districts and more recently the transitional school district in the City of St. Louis, with independent taxing authority.

Sections 11(b) and 11(c) are authorizations for school districts to levy ad valorem property taxes. Sections 11(b) and 11(c) have been amended several times over the years. Amendments to those sections have been liberally construed by this Court in other cases to authorize school tax levies when the levies are called into question. For example, in *Rathjen v. Reorganized School District R-II of Shelby County*, 284 S.W.2d 516 (Mo. banc 1955), a trial court which had enjoined the collection of taxes levied by a school district was reversed – with this Court reading the phrase "for school purposes" expansively rather than being limited to its meaning in 1875.

And, in *Fisher v. Reorganized School District No. R-V of Grundy County*, 567 S.W.2d 647 (Mo. banc 1978), the Court interpreted the 1970 amendment to Section 11(c) of Article X to be read expansively so that a levy which had been adopted with voter approval could continue indefinitely – even though at the time the particular levy was originally adopted it could only extend for one year. This Court then noted, which is

particularly pertinent here, that Section 11(c) continued to have the old language of the levy continuing "not to exceed one year" as well as new language that "the last tax rate approved shall continue and the tax rate need not be submitted to the voters". This Court resolved the conflict in the following manner:

> "Circumstances could be hypothesized which would make the same repugnant one to the other. If construed as such, the law provides that '(a)s **the latest expression of the will of the people a clause in a constitutional amendment will prevail over a provision of the constitution or earlier amendment** inconsistent therewith, since an amendment to the constitution becomes a part of the fundamental law, and its operation and **effect cannot be limited or controlled by previous constitutions or laws that may be in conflict with it**.' 16 C.J.S., Constitutional Law § 26, p. 99; State ex rel. Board of Fund Commissioners, et al. v. Holman, 296 S.W.2d 482, 491 (Mo. banc 1956)." (emphasis added).

The foregoing analysis in *Fisher* was then reiterated in *Ederer*[11] *v. Dalton*, 618 S.W.2d 644, 646 (Mo. banc 1981), where the Court noted with respect to the 1970 amendment to Section 11(c):

> "It [the 1970 amendment] **obviated the requirement that tax levies be submitted annually to the voters**. [citing *Fisher*] **Thus the one year**

[11] Mr. Ederer was one of the unsuccessful taxpayers in one of the underlying lawsuits in *Three Rivers Junior College District, supra.*

> **limitation** which at one time forced tax levies to be voted on every year **was rendered ineffectual**." (emphasis added).

The *Ederer* Opinion then noted:

> "**The provisions of the later amendment prevail over provisions of a prior amendment to the extent they are inconsistent**. State ex rel. Board of Fund Commissioners v. Holman, 296 S.W.2d 482, 491 (Mo. banc 1956)." (emphasis added).

Thus, it is clear that by adopting Constitutional Amendment No. 2, the provisions of Section 11(b) authorizing a school board to adopt an operating tax levy without voter approval – now up to $2.75 – now authorizes a school board to adopt a $2.75 operating tax levy without any of the constraints of Section 22(a) of the Hancock Amendment.

In construing the Headlee Amendment[12] to the Michigan Constitution, it is noted that the Michigan Supreme Court in *American Axle & Manufacturing, Inc. v. City of Hamtramck*, 604 N.W.2d 330 (Mich. 2000), construed the requirements of the Headlee Amendment in a limited fashion to hold that under the Michigan equivalent of Section 22(a) of Hancock, if a local tax was "authorized by law", i.e., a statute, at the time the Headlee Amendment was adopted, it could later be imposed even though the tax was

[12] Much of the Hancock Amendment derives from the Headlee Amendment to the Michigan Constitution which had been adopted in Michigan prior to the Hancock Amendment being adopted in Missouri. *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, l.c. 9 (Mo. banc 1981).

not in effect at the time the Headlee Amendment was adopted. Here, we have Constitutional Amendment No. 2 which authorizes the $2.75 levy to be imposed after the Hancock Amendment was adopted.

And, simply because a school district might lower an authorized tax levy in one year, e.g., the Respondent School having a post-1980 operating tax levy of $3.15, a school district is not precluded from lowering the tax levy in one year and raising it in a subsequent year without voter approval – even if, *arguendo*, the Hancock Amendment is fully applicable. See, *Fahnenstiel v. City of Saginaw*, 368 N.W.2d 893, l.c. 896 (Mich. Ct. App. 1985), holding and reasoning with respect to the Headlee Amendment in Michigan:

> "Further, **public policy supports** the conclusion that a local unit of government **may raise its tax rate without a vote of the people** providing the rate so raised does not exceed the maximum rate permitted on the date the Headlee Amendment became effective. **If the 'maximum rate authorized by law' were lowered every time a municipality decided to reduce its millage rate, the purpose of the Headlee Amendment would be chilled since government officials would hesitate to impose a lower tax rate for fear that the lower rate would establish a new ceiling and, if the economy turned downward, municipal services could not be maintained.**" (emphasis added).

See also to the safe effect, the Opinion of Missouri Attorney General William Webster, Opinion No. 79-88, issued on March 31, 1988, in which it was concluded that under

Section 22(a) of the Hancock Amendment, political subdivisions had "the flexibility to decide not to levy the maximum authorized tax without adversely affecting" how a maximum authorized current levy is calculated in future years.

Constitutional Amendment No. 2 was adopted as a safe harbor for a school board of any school district to adopt an operating tax levy of $2.75 without voter approval. Constitutional Amendment No. 2 prevails over the provisions of Section 22(a) of the Hancock Amendment which amended the Constitution 18 years earlier.

The need for a "safe harbor" is apparent when one considers the complexities of a reassessment rollback under Section 22(a) of Hancock. The Opinion of the Court in *Green I* discussed the differences between the reassessment rollback requirements of Section 22(a) and Section 137.073, RSMo:

> "As the analysis of the requirements of article X, **section 22(a) and section 137.073, RSMo**, reveals, the two provisions **serve two related but different purposes**. Article X, Section 22(a) provides for a maximum authorized levy **based on adjustments to the rate levied on November 4, 1980** [emphasis added], unless the voters grant approval otherwise. See *Fort Zumwalt Sch. Dist. v. State*, 896 S.W.2d 918, 921 (Mo. banc 1995). The computation under article X, section 22(a) establishes the maximum amount that '**could have been collected** [emphasis by the Court] at the existing authorized levy on the prior assessed value.' Mo. Const. Art. X, section 22(a) (emphasis added [by the Court]). Article X, section 22(a) provides for a maximum authorized levy based on adjustments to the rate

> levied on November 4, 1980, unless the voters grant approval otherwise. *See Fort Zumwalt Sch. Dist. v. State*, 896 S.W.2d 918, 921 (Mo. banc 1995). The computation under article X, section 22(a) establishes the maximum amount that '**could have been collected** at the existing authorized levy on the prior assessed value.' Mo. Const. Art. X, section 22(a) (emphasis added [by the Court]). The tax rate ceiling under section 137.073, RSMo, meanwhile, is the amount that would 'produce from all taxable property substantially the same amount of tax revenue **as was produced** in the previous year. . . .' Section 137.073.2, RSMo (emphasis added [by the Court]). Although the formulas used to compute the two tax rate ceilings may involve some of the same variables, section 137.073, RSMo, and article X, section 22(a) may establish two distinct ceilings." 13 S.W.3d at 285-286.

The "tax rate ceiling" determined pursuant to Section 137.073 is not applicable to the School Districts here because of the language in Section 137.073.1(3), which provides that "other provisions of law notwithstanding," a district may levy the amount required to secure state aid under Section 163.021, RSMo. Here the School Districts, by imposing a levy of $2.75 (the amount required to secure state aid), do not have to satisfy the "tax rate ceiling" requirements of Section 137.073, RSMo.

In the last quoted analysis by this Court in *Green I,* the Court cites to page 281 of the *Fort Zumwalt* case to reason that the computations under Section 22(a) must look back and start in 1980. At page 281 of *Fort Zumwalt* is the following analysis:

> "Read as a whole, the Hancock Amendment, Mo. Const. art. X, §16-24, aspires to erect a comprehensive, constitutionally rooted **shield** erected **to protect taxpayers** from government's ability **to increase the tax burden above that borne by the taxpayers on November 4, 1980**. First, Section 18(a) establishes a revenue limit for state government. . . . Second, Section 21 prohibits unfounded mandates. * * * Finally, local government may increase any 'tax, licenses or fees[sic]' only with voter approval. § 22(a)."

(emphasis added.)

With a starting point of 1980, to determine what "**could have been collected**" (as emphasized by the Court), it is necessary to make computations for <u>each</u> year after Hancock was adopted in 1980 to determine what "could have been collected" in each year and consequently in each succeeding year (**not what was actually collected**) to ascertain the current "revenue limit" so that with permissible adjustments (e.g., voter approved levy increases, cost of living increases, and adjustments for "new construction and improvements"), the "tax burden" in a particular year will not have been increased above that in effect on November 4, 1980.

Fort Zumwalt further demonstrates that yearly computations from 1980 to date will be required, and that such may be difficult. In considering what is required to show that increased burdens have placed upon political subdivisions by the State in violation of Section 21 of Hancock, this Court in *Fort Zumwalt* reasoned:

> " . . . [T]he taxpayers must present evidence to establish the program mandated by the state in 1980-81 and the ratio of state to local spending for the

mandated program in that year. **The taxpayers must then establish** the costs of the mandated program **in each subsequent year** and the ratio of state to local spending for the mandated program in each subsequent year. Unless the school district's budgets allocated personnel costs and operating expenditures in a highly segmented manner, clearly distinguishing resources directly committed to the state mandates for special education from those not so dedicated, it may be impossible to prove the correct proportions.

* * *

"The state's liability is limited to the state's mandated activity and the state-financed proportion of the cost of that activity in effect in 1980-81. **Providing these factors for 1980-81 and each subsequent year will require sophisticated budgetary evidence and economic expertise**." (896 S.W.2d at 922-923, emphasis added).

Just as in the *Fort Zumwalt* case where there were difficulties (and perhaps impossibility) in making the requisite calculations under Section 21 of Hancock from November 4, 1980, through the years to a current date for the Fort Zumwalt School District, so too would there be difficulties in making the requisite assessed valuation determinations and adjustments under Section 22(a) from November 4, 1980, through the years to the 2001 year tax involved in this case. For example, it was not until during 1984 that local assessors were required by statute to separately determine the part of the total assessed valuation within a district for the particular year that was attributable to "new construc-

tion and improvements."[13] The burden of proof is on the Plaintiffs. See, *Fort Zumwalt, supra*. Consequently, in the words of the *Fort Zumwalt* opinion, "it may be impossible to prove the correct proportions" so that the requisite allocations can be made as of the January 1 assessment dates in 1981, 1982, 1983, and 1984 between that attributable to "new construction and improvements" in the prior year and that amount attributable to other property.

In the Brief of Respondent Morgan County R-II School District which was filed in this Court in *Green I,* we set forth some of the basic calculation steps which would be involved in determining whether a reassessment rollback would actually be required, assuming, *arguendo*, the applicability of Section 22(a) to a school district which has a levy of $2.75 or less. To illustrate the complexity and difficulty of a reassessment roll-back under Section 22(a), without even considering other complexities such as school district boundary changes, missing records, changes in property subject to assessment, etc., we attach as Appendix G to this Brief (A-57) excerpts of the Brief of Respondent Morgan County R-II School District which were before this Court in *Green I.*

One might ask why, if the burden is on the taxpayer, a safe harbor is needed by a school district in adopting a $2.75 levy. The problem is that since litigation is adversar-ial, a school district must go to the expense of preparing a defense including accounting

[13] House Bill No. 1254 enacted in 1984 for the first time required assessors to separately determine the "value of new construction and improvements." See, § 137.073.4(1) as amended in 1984 by House Bill No. 1254.

or other experts who can assimilate data and place it before a trial judge in understandable form. The process is expensive and uncertain, since the myriad of shoals of a Section 22(a) reassessment rollback have not been judicially mapped and there remain varying opinions by governmental officials and attorneys about how a school district is to navigate through those shoals.

The issues discussed under this Point I relative to the effect of Constitutional Amendment No. 2 adopted in 1998 by the voters of Missouri authorizing a school district to adopt a $2.75 levy without further voter approval vis-à-vis the provisions of Section 22(a) of the Hancock Amendment **need to now be decided by this Court**. School districts throughout the state have proceeded to levy property taxes at a $2.75 rate based upon a conclusion that the provisions of Constitutional Amendment No. 2 prevailed over both the voter approval and reassessment rollback provisions in Section 22(a) of Hancock. State officials (the Department of Elementary and Secondary Education and the State Auditor) have taken the same position.

In *Review of 2001 Property Tax Rates, Report No. 2001-121*, issued by State Auditor Claire McCaskill on December 28, 2001, the State Auditor found:

> "The **124 schools** listed in **Appendix IX** increased taxes and revenues by $30,502,514 without voter approval by utilizing the Constitutional Amendment No. 2 approved by voters on November 3, 1998, **which allows school districts to levy a minimum of $2.7500, per $100 assessed valuation by school board vote**." Page 4.

Appendix IX to Report No. 2001-121 lists the 124 school districts which "utilized" the provisions of Constitutional Amendment No. 2 to adopt operating levies of $2.75 or less in 2001, the tax year in question in this appeal. The list includes the Respondent Morgan County R-II School District, as well as the Joplin R-VIII School District and the Webb City R-VII School District which engendered the appearance of *Amici* David C. Humphreys, Tamko Roofing Products, Inc., Associated Industries of Missouri and the Missouri Chamber of Commerce & Industry, in this appeal in this Court. At page 5 of *Report No. 2001-121* is a listing of 18 "Taxing Authorities Levying an Excess Tax Rate." The Respondent Morgan County R-II School District, Joplin R-VIII School District and Webb City R-VII School District do **not appear** on that list. The listing of school districts in Appendix IX to *Report No. 2001-121* lists school districts in 65 different counties. *Report No. 2001-121*, as well as *Report No. 2002-123*, hereinafter discussed, can be found at the State Auditor's web site – www.auditor.state.mo.us.

In her *Review of 2002 Property Tax Rates, Report No. 2002-123*, issued on December 31, 2002, State Auditor McCaskill also concluded with respect to the 2002 tax year:

> "**School Districts Using Amendment 2 to Increase Tax Rates**
>
> The 111 schools listed in *Appendix IX* increased taxes and revenues by $27,669,024 without voter approval by utilizing the Constitutional Amendment No. 2 approved by voters on November 3, 1998, which allows school districts to levy a minimum of $2.7500, per $100 of assessed valuation, by school board vote." Page 5.

Respondent Morgan County R-II School District, the Joplin R-VIII School District and the Webb City R-VII School District are among the 111 districts listed in Appendix IX to the State Auditor's *Report No. 2002-123*.

There is a great amount at stake involving not just the Respondent School District and the Joplin and Webb City School District, but also over 100 other school districts throughout the state. These school districts have relied upon interpretations by state officials in adopting operating tax levies of $2.75 pursuant to Constitutional Amendment No. 2. Now that the Appellants in this appeal have raised the issue in this case and the Humphreys-Tamko Plaintiffs filed their action in the Jasper County Circuit Court after the Western District of the Missouri Court of Appeals filed its Opinion in this case, the issue needs to be decided in this case.

Should, *arguendo*, the Respondent School District be wrong in the position which it takes, then the Opinion should only apply for the Appellants in this case and should otherwise only have prospective application for tax years starting with the 2004 tax year. School districts are required by law to adopt tax levies and report the levies to the county clerk before September 1 of each tax year. Section 164.011.2, RSMo. Assessors report the assessed valuations of properties to the county clerk by May 31 of each year, and the county clerk, in turn, is to report the assessed valuations within a school district to the school district by July 1 of each year. Section 137.245, RSMo.

School district elections can only be held on specified dates (Section 115.123, RSMo), and school districts must give notice to the election authority of any called election for a tax levy at least ten weeks before the date of the election (Section 115.125,

RSMo). Between the time when a school district knows in June what the total assessed valuation of property is within the district until September 1 when the district has to have submitted its levies to the county clerk, there is only one date upon which an election can be held – and that is on the first Tuesday after the first Monday in August. Section 115.123, RSMo, and a ten week notice period must be considered with respect to the August election date. The options of when a school board can make an informed judgment to seek voter approval are limited, and certainly are not now available for the 2003 tax year.

We finally note that the argument of the Humphreys-Tamko *amici* concerning a "windfall" for school districts because of an increase in total assessed values within a school district is specious. Under the Missouri school foundation formula set forth in Section 163.031, RSMo, there is in effect a deduction of the taxes attributable to increased assessed valuation from the amount of state aid which a school district receives from the State of Missouri. See line 2 of the formula. While the "windfall" argument may make good copy in the *Joplin Globe*, it is neither a legal argument nor does it have a basis in fact insofar as either the Respondent School District, the Joplin School District or the Webb City School District is concerned.

For the above and foregoing reasons, the judgment of the trial court should be affirmed because Constitutional Amendment No. 2 which received voter approval in 1998 authorized the Respondent School District to adopt an operating tax levy of $2.75 for the tax year 2001 without further voter approval notwithstanding any provision of Section 22(a) of the Hancock Amendment to the contrary.

II.

The Judgment Of The Trial Court Dismissing The Claims Of Appellant For Declaratory Relief Should Be Affirmed Because (1) Appellants Have An Adequate Remedy At Law For Recovery Of 2001 Taxes Paid Under Protest Pursuant To Section 139.031, RSMo, (2) No Justiciable Controversy Separate And Apart From Appellants' Refund Claims Pursuant To Section 139.031, RSMo, Exists With Respect To The Lawfulness Of The Respondent School District's 2001 Tax Levy, (3) No Justiciable Controversy Exists With Respect To The Lawfulness Of The Respondent School District's Tax Levies For The 1999 And 2000 Tax Years, (4) The Appellants Do Not Have A Legally Protectable Interest At Stake With Respect To The Lawfulness Of The Respondent School District's Tax Levies For The 1999 And 2000 Tax Years And (5) With Respect To Appellants' Request In Count III For A Declaration With Respect To A Loss Or Reduction Of State Aid, No Justiciable Controversy Exists And The Issue Is Not Ripe For Determination.

Standard of Review

The trial court, upon motions to dismiss or strike, determined that the claims of Appellant for declaratory relief were not justiciable. The determination that the declaratory relief claims were not justiciable was in effect a dismissal for lack of jurisdiction. *Missouri Soybean Association v. The Clean Water Commission*, 102 S.W.3d (10 (Mo. banc 2003). The standard for review with respect to a trial court's dismissal for lack of

jurisdiction is that "[t]his Court will affirm the trial court's judgment unless there is no substantial evidence to support it, unless the decision is contrary to the weight of the evidence, or unless the trial court erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Constitutional interpretation is an issue of law that this Court reviews *de novo*." *Farmer v. Kinder*, 89 S.W.3d 447, l.c. 449 (Mo. banc 2002).

Argument

This Point is responsive to Appellants' Points I, II and III. Our Point I, above, goes to the merits of all of the Appellants' Points, so in effect, our Point II is a second response to Appellants' Points I, II and III.

This Court in *Missouri Soybean Association v. The Clean Water Commission*, 102 S.W.3d 10, l.c. 25 (Mo. banc 2003), held that certain requirements had to be met before claims for declaratory relief can be maintained:

> "An examination of the general principles underlying declaratory judgments also supports dismissal of the appellants' action. A declaratory judgment is not a general panacea for all real and imaginary legal ills. *Harris v. State Bank & Trust Company of Wellston*, 484 S.W.2d 177, 178 (Mo. 1972); *City of Joplin v. Jasper County*, 349 Mo. 441, 161 S.W.2d 411, 413 (1942). It is not available to adjudicate hypothetical or speculative situations that may never come to pass. *Farm Bureau Town and Country Insurance Company of Missouri*, 909 S.W.2d 348, 352 (Mo. banc 1995); *State ex rel. Nixon v. American Tobacco Company, Inc.*, 34 S.W.3d 122, 128 (Mo.

banc 2000); *see also Local Union 1287 v. Kansas City Area Transportation Authority*, 848 S.W.2d 462, 464 (Mo. banc 1993) (noting reasons courts decline to render hypothetical judgments and opinion). **To grant a declaratory judgment, the court must be presented with**: (**1) a justiciable controversy** that presents a real, substantial, presently-existing controversy admitting of specific relief, as distinguished from an advisory decree upon a purely hypothetical situation; **(2) a plaintiff with a legally protectable interest at stake**, 'consisting of a pecuniary or personal interest directly at issue and subject to immediate or prospective consequential relief;' **(3) a controversy ripe for judicial determination**; and **(4) an inadequate remedy of law**. *Northgate Apartments, L.P. v. City of North Kansas City*, 45 S.W.3d 475, 479 (Mo. App. 2001); *see also Missouri Health Care Association v. Attorney General of the State of Missouri*, 953 S.W.2d 617, 620 (Mo. banc 1997)." (emphasis added).

Because none of the asserted declaratory relief claims of the Appellants in Counts I, II or III of their Petition satisfy all of these requirements, the trial court properly dismissed Counts I, II and III.

It has been established by this Court that for any declaratory relief claims with respect to the Hancock Amendment, a plaintiff must establish justiciability. And to do that, a violation of the Hancock Amendment must be demonstrated. Here, therefore, an actionable violation of Hancock must be shown to satisfy the justiciability requirement. If we are correct in our Point I that Constitutional Amendment No. 2 approved by the voters

in 1998 authorized the Respondent School District to adopt an operating levy of $2.75 without further voter approval notwithstanding any provisions of Section 22(a) of Hancock, then there is no Hancock violation, justiciability does not exist and declaratory relief cannot be granted.

In *Goode v. Bond*, 652 S.W.2d 98 (Mo. banc 1983), this Court concluded in effect that because the revenues generated by Proposition C had received voter approval, the Proposition C revenues did not have to be included in "total state revenue", there was therefore no violation of the state revenue limit in Section 18 of Article X, and justiciability was therefore lacking:

> "Because the first sentence of the **Hancock** Amendment, Article X, §16, **excludes those increases** [the Proposition C one-cent sales tax increase] **in taxes receiving voter approval from the limitations** contained in §18, and **Proposition C received such approval**, we **take judicial notice** that there is **no justiciable controversy** between the parties and dismiss the appeal." (emphasis added).

In *Dirck v. State*, 665 S.W.2d 615 (Mo. banc 1984), three plaintiffs (Senators Dirck, Webster and Schneider, in their taxpayer capacities) brought a declaratory judgment action with respect to the Hancock Amendment seeking to determine (i) that the state "revenue limit" established by Article X, Section 18(a), Missouri Constitution for the fiscal year 1981-82 had been exceeded and (ii) whether the total appropriations of state revenue for fiscal year 1982-83 exceeded the spending limit established by Article X, Section 20, Missouri Constitution. The trial court concluded that the Hancock limits

were not exceeded for the years in question. An appeal was taken with respect to the determinations made by the trial court as to whether particular revenues were or were not a part of total state revenues within the meaning of Hancock.

The Supreme Court in *Dirck* held that there was no "justiciable controversy, ripe for adjudication" because neither the revenue limit nor the expenditure limit was exceeded:

> "The Court having considered the briefs and arguments of the parties finds there is **no justiciable controversy between the parties, ripe for adjudication.** It is therefore ordered that the judgment of the trial court be and hereby is vacated and cause dismissed." (emphasis added).

And, in *Buechner v. Bond*, 650 S.W.2d 611, l.c. 614 (Mo. banc 1983), this Court held that declaratory relief would not be granted with respect to the state revenue limits in Section 18 of the Hancock Amendment "because no . . . refund is imminent". "In order that a controversy be ripe for adjudication a 'sufficient immediacy' must be established." *Id.* Consequently, not only do the claims for declaratory relief lack justiciability, they are also not ripe for determination.

With respect to claims for declaratory relief re the lawfulness of the Respondent School District's tax levy for the 2001 tax year, the Appellants had an adequate remedy at law under the provisions of Section 139.031, RSMo, which provides for the payment of taxes under protest and the commencement of lawsuits within 90 days thereafter to recover taxes paid under protest. In paragraph 44 of Count IV of the Appellants' Petition in which they seek to recover taxes paid under protest pursuant to Section 139.031, the

Appellants state that "[t]he allegations of paragraphs 1 thru 43 are incorporated be (sic) reference as if fully set forth herein." See App. Br. A-12. The "allegations of paragraphs 1 thru 43" include all of the allegations set forth in the Appellants' declaratory relief claims in Counts I, II or III. Consequently, any factual allegations of illegality in Counts I, II and II with respect to the Respondent School District's $2.75 tax levy for the tax year 2001 are subsumed into their Section 139.031 claims asserted in Count IV.

Because the Appellants had an adequate remedy at law pursuant to Section 139.031, RSMo, with respect to the lawfulness of the 2001 tax levy, Appellants are not entitled to declaratory relief under Counts I, II or III. See, *Missouri Soybean Association, supra*; *Kinder v. Holden*, 92 S.W.3d 793, l.c. 805 (Mo. App. W.D. 2002); and *Gleuck Realty Company v. City of St. Louis*, 318 S.W.2d 206 (Mo. 1958).

The Appellants also lack "standing" or what is referred to in *Missouri Soybean* as "(2) a plaintiff with a legally protectable interest at stake, 'consisting of a pecuniary or personal interest directly at issue and subject to immediate or prospective consequential relief'" to assert any claims for declaratory relief or for tax refunds other than claims which are properly lodged under Section 139.031, RSMo.[14] See also, *State ex rel. Nixon v. American Tobacco Company*, 34 S.W.3d 122, 132 (Mo. banc 2000), holding that "[a] party who lacks standing may not seek a declaratory judgment action."

[14] As we demonstrate under our Point I, even if Section 139.031 has been properly invoked, the Appellants are not entitled to any tax refunds.

Any claim that the Appellants might have had with respect to the lawfulness of the Respondent's ad valorem property tax levies for the 1999, 2000 and 2001 tax years for declaratory relief, injunctive relief or for tax refunds separate from Section 139.031 claims cannot be maintained in this action because they were not timely brought. This suit was not commenced until January 14, 2002 (L.F. 1). Consequently, except for any properly lodged Section 139.031 claims with respect to the 2001 taxes, the action was not timely filed insofar as any declaratory relief claims, claims for injunctive relief, other tax refund claims or any other claims relative to the lawfulness of the 1999, 2000 or 2001 tax levies of the Respondent Morgan County R-II School District under Section 22(a) of the Hancock Amendment or otherwise. The Judgment of the trial court in dismissing such claims should therefore be affirmed.

Because such claims were **not timely filed**, three (and possibly the fourth) of the four factors that must be present under *Missouri Soybean Association* in order to maintain claims for declaratory relief are not present – (1) a justiciable controversy, (2) standing, i.e., a legally protectable interest at stake, and (3) a controversy ripe for judicial determination. See, holding applying the untimely rationale, Concurring Opinion of Judge Wolff in *Green v. Lebanon R-III School District*, 13 S.W.3d 278, l.c. 286 (Mo. banc 2000) ("*Green I*"); *Koehr v. Emmons*, 55 S.W.3d 859 (Mo. App. E.D. 2001) ("*Koehr I*"); *Green v. Lebanon R-III School District*, 87 S.W.3d 365 (Mo. App. S.D. 2002) ("*Green II*"); *Metts v. City of Pine Lawn*, 84 S.W.3d 106 (Mo. App. E.D. 2002); and *Koehr v. Emmons*, 98 S.W.3d 580 (Mo. App. E.D. 2002) ("*Koehr II*").

Appellants and *Amici* assert that there is no "timeliness" requirement for asserting claims with respect to the lawfulness of tax levies, be it a question of constitutional or statutory unlawfulness. The just cited Opinions hold to the contrary. We therefore discuss these Opinions and other cases in more depth.

In *Koehr v. Emmons*, 55 S.W.3d 859 (Mo. App. E.D. 2001) ("*Koehr I*"), plaintiffs sought declaratory relief and refunds of taxes allegedly levied in violation of Article X, Section 22(a). The Missouri Court of Appeals, Eastern District, relying upon Judge Wolff's concurring opinion in *Green v. Lebanon R-III School District*, 13 S.W.3d 278, 286 (Mo. 2000), held that to enforce the rights granted under Article X, Section 22(a), a party must challenge the tax **before the tax is due**. In *Koehr I*, the Court of Appeals, Eastern District, stated:

> "Although we are not bound by Judge Wolff's opinion, we nonetheless find it persuasive and adopt it as a correct declaration of the law."

Id. at 863 (emphasis added). The Opinion in *Koehr* summarized Judge Wolff's Concurring Opinion as follows:

> "Judge Wolff concluded that claims for refunds of [property] taxes allegedly collected in violation of the Hancock Amendment must be asserted before the taxes become payable – *i.e.*, before December 31 of the tax year at issue. *Id.* at 287. Quoting from *Ring v. Metropolitan St. Louis Sewer Dist.*, 969 S.W.2d 716, 718-19 (Mo. banc 1998), Judge Wolff pointed out that the enforcement of right granted in the Hancock Amendment may be accomplished in two ways: (1) a suit to enjoin collection of

the tax until its constitutionality can be determined, or (2) a *timely* action for refund."

Id. at 863.

Thus, *Koehr I* holds that except for a Section 139.031 action, the only way to enforce the Hancock Amendment is to seek an injunction to enjoin the collection of the tax before the tax becomes due. Obviously, for the injunction to be effective, the action must be brought before the taxes are due and payable.

The *Koehr I* Opinion was issued by the Eastern District on July 24, 2001 – after decisions upon which Appellants and *Amici* aligned with the Appellants place principal reliance on this issue in their Briefs – *City of Hazelwood v. Peterson*, 48 S.W.3d 38 (Mo. banc 2001), and *Ring v. Metropolitan St. Louis Sewer District*, 769 S.W.2d 716 (Mo. banc 1998). The *Koehr* Plaintiffs in their motion for rehearing in the Eastern District of the Missouri Court of Appeals and here in their application for transfer asserted that the Opinion in *Koehr I* was contrary to *Hazelwood* and *Ring*. See copies of motion for rehearing filed in the Court of Appeals and the application for transfer (with attached motion for rehearing filed in the Court of Appeals) filed in this Court's file for SC83959. This Court denied the application for transfer on October 23, 2001.

Upon remand from this Court's decision in *Green I*, the issue left open by the Opinion of the Court in *Green I* (and which Judge Wolff would have decided as per his Concurring Opinion) for the trial court to consider on remand, i.e., "whether the requests for refund were timely filed" (13 S.W.3d at 284), was presented by motions for judgment on the pleadings to the Honorable George M. Flanigan, Senior Judge (who was assigned

as trial judge in *Green* and the companion *King* case subsequent to remand). Judge Flanigan then entered judgments dismissing the *Green* and *King* cases because the petitions seeking declaratory relief and tax refunds were not filed before December 31 of each of the tax years in question.[15] The *Green* and *King* plaintiffs then appealed, and the judgments of dismissal were affirmed in *Green v. Lebanon R-III School District*, 87 S.W.3d 365 (Mo. App. S.D. 2002) ("*Green II*"). Counsel for the Appellants in *Green II* is the same counsel as counsel for the Appellants here, and counsel for the Respondent School Districts in *Green II* is the same counsel as counsel for the Respondent School District here. The Appellants in *Green II* asserted that *Koehr I* was contrary to *Hazelwood* and *Ring*, and that *Koehr I* should not be followed. Judge Montgomery, with Judges Garrison and Barney concurring, wrote the Opinion and followed the Eastern District rationale in *Koehr I*:

> "In *Koehr*, the Eastern District of this Court adopted the rationale of Judge Wolff's concurring opinion in *Green I* with this statement:
>
> > 'Although we are not bound by Judge Wolff's opinion, we nonetheless find it persuasive and adopt it as a correct declaration of the law.'

[15] The First Amended Petition in *King* which for the first time sought tax refunds for the 1998 tax year was filed on December 31, 1998, not before December 31, 1998. See L.F. 4 and 48 of the Legal File filed in this Court in SC81746, the *King* appeal which was decided by *Green I.*

Id. *Koehr* summarized Judge Wolff's concurring opinion as follows:

> 'Judge Wolff concluded that claims for refunds of [property] taxes alleged collected in violation of the Hancock Amendment must be asserted before the taxes became payable – i.e., before December 31 of the tax year in question'
>
> * * *
>
> Taxpayers' only point alleges the trial court erred in granting judgment on the pleadings and finding their claims were not timely filed. * * * We disagree." 87 S.W.3d at 366.

The Appellants in *Green* and *King*[16] in their motion for rehearing in the Southern District and in their application for transfer in this Court asserted that the Opinion in *Green II* was contrary to *Hazelwood* and *Ring*. See, *King v. Morgan County R-II School District*, Supreme Court Case No. SC84822, in which this Court on October 22, 2002, denied transfer with respect to *Green II.*

In *Metts v. City of Pine Lawn*, 84 S.W.3d 106 (Mo. App. E.D. 2002), plaintiffs asserted that certain municipal taxes violated Section 22(a) of the Hancock Amendment and plaintiffs sought injunctive relief and tax refunds. The trial court refused to grant any

[16] Appellants Liston King, Martha King and Patricia Hoff in *King* are also Appellants in this appeal. Those Appellants are barred by res judicata and collaterally estopped from contesting the holdings in *Green II.* The other Appellants may also be collaterally estopped by the doctrine of virtual representation.

relief to the plaintiffs, holding (1) that since the plaintiffs had not complied with the payment under protest provisions of Section 139.031, RSMo, that plaintiffs could not recover tax refunds and (2) that the lawsuit was filed too late for any injunctive relief. The Eastern District affirmed, relying upon and quoting from *Ring*, as follows:

> "'First, taxpayers may seek an injunction to enjoin the collection of a tax until its constitutionality is finally determined. Second, if a political subdivision increases a tax in violation of article X, section 22(a), and collects that tax prior to a final, appellate, judicial opinion approving the collection of the increase without voter approval, the constitutional right established by article X, section 22(a), may be enforced *only* by a *timely* action to seek a refund of the amount of the constitutionally-imposed increase.'"

Id. at 108. The Eastern District held in *Metts* that the Hancock claims were untimely and that any Hancock refund claims had to be asserted pursuant to Section 139.031:

> "Section 139.031 establishes a mechanism for a taxpayer to protest taxes assessed against the taxpayer. *Lett v. City of St. Louis*, 948 S.W.2d 614, 620 (Mo. App. 1996). * * * And we have required that section 139.031 be followed when the protest is based on unconstitutionality. *Id*. Once paid, taxes, even taxes collected under an unconstitutional statute, can only be recovered through proper statutory proceedings. *Id*. **This procedure applies to taxes challenged as violations of the Hancock Amendment** to the Missouri constitution. **Taxpayers who fail to protest property taxes under 139.031 cannot obtain refunds.** *Buck v. Leggett*, 813 S.W.2d 872,

877 (Mo. banc 1991); *Jenkins by Agyei v. State of Missouri*, 962 F.2d 762 (8th Cir. 1992) (applying Missouri law)." (emphasis added).

Id. at 109.

In *Koehr v. Emmons*, 98 S.W.3d 580 (Mo. App. E.D. 2002) ("*Koehr II*"), the same plaintiffs as in *Koehr I* brought a new action in 2001 asserting violations of Section 22(a) of the Hancock Amendment with respect to property taxes for the year 2000 and sought tax refunds because of an alleged violation of a tax rate ceiling. The trial court dismissed their petition. The Court of Appeals in *Koehr II* affirmed the dismissal of the Plaintiffs' Petition, holding that the claims were untimely.

The taxpayers in *Koehr II* asserted that they could secure tax refund relief based upon the Hancock Amendment itself and cited, as the Appellants and *Amici* aligned with them have here, *City of Hazelwood v. Peterson*, 48 S.W.3d 36 (Mo. banc 2001). The Court of Appeals in *Koehr II* considered and distinguished *Hazelwood*:

> "*City of Hazelwood* is factually distinguishable from the present case. In that case, the City of Hazelwood annexed an area for which Florissant Valley First District was to provide fire, emergency and ambulance services. The taxpayers of the annexed area paid taxes to Hazelwood and the city in turn paid the Florissant Valley First District for their services. An election was held to increase the tax rate in the Florissant Valley Fire District, and the voters approved the increase. **After the election, a contest was filed and while the contest was pending, the district levied the increase.** The City of Hazelwood paid the increased amount; however,

they did so under protest. **The election was ultimately set aside** and a new election took place. The increase did not meet with voter approval after the second election. Subsequently, the City of Hazelwood brought suit for a refund of the taxes. The issue before the Missouri Supreme Court was whether the Hancock Amendment must be read in conjunction with the election laws of the state in order to determine whether a tax increase is constitutional. The district attempted to argue that the tax increase was valid while the election contest was pending, pursuant to the state's election statutes; therefore, the collection of the increased tax could not be a violation of the Hancock Amendment because it was approved by the voters. However, the court determined that the constitutionality of the tax increase was to be determined from the plain language of the Hancock Amendment itself. *Id.* at 39.

"The present case is not a question of the determination of the constitutionality of a tax increase based on a statute and the constitution. Rather, it is a **procedural question concerning the timeliness of filing** an action where the remedy sought is a refund of taxes allegedly collected in violation of the Hancock Amendment. **It has been determined that the statutes which provide the mechanism by which taxpayers can protest taxes must be followed when the tax is challenged on a constitutional basis**. *Metts v. City of Pine Lawn*, 84 S.W.3d 106 (Mo. App. 2002). '**Once paid, taxes, even taxes collected under an unconstitutional statute, can**

> **only be recovered through proper statutory proceedings. This procedure applies to taxes challenged as violations of the Hancock Amendment to the Missouri constitution.**' *Id*. Thus, the failure to timely protest the payment of alleged unconstitutional taxes and to timely commence an action for the refund of such taxes is fatal, even where the challenge is based on the Hancock Amendment." *Id*. (emphasis added).

Koehr II properly distinguished *Hazelwood*. We here discuss *Hazelwood* more fully. It is noted that in *Hazelwood* no issue of timeliness of filing suit was raised by the political subdivision (the Florissant Valley Fire Protection District), nor was it asserted by the political subdivision that any tax refund claims for taxpayers had to be brought pursuant to Section 139.031, RSMo. See also, the superceded opinion of the Eastern District of the Court of Appeals in *Hazelwood* at 2000 WL 459713 which does not reflect that either issue was raised.

It is further noted that the Court in *Hazelwood* was careful to limit its holding to a determination that "[under] the specific facts of this case, the court did not abuse its discretion . . ." 48 S.W.3d at 36. The specific facts of the case relate to an election called by the Florissant Valley Fire Protection District on August 6, 1996, to approve a 10¢ tax levy. The results of the election as certified on August 19, 1996, were close, with there being a margin of 13 votes favoring the tax increase. 48 S.W.3d at 38. The total number of votes certified by the election authority of St. Louis County was 4,445 votes in favor and 4,432 votes against. See, page 2 of the Judgment of St. Louis County Circuit Judge Kenneth Romines in the Legal File filed in the Supreme Court in *Hazelwood*. On August

23, 1996, an election contest was filed in the St. Louis County Circuit Court challenging the results of the election, styled *McBride, et al. v. Board of Election Commissioners, et al*. See page 2 of Judgment of Judge Romines in *Hazelwood*. "While the election contest was still pending, the District levied the tax increase" (emphasis added). 48 S.W.3d at 38. The trial court in *McBride* set aside the election results, and this decision was affirmed on appeal in *McBride v. Board of Election Commissioners*, 945 S.W.2d 622 (Mo. App. E.D. 1997). This is recounted by Judge Romines in his Opinion in *Hazelwood* and in the superceded opinion of the Eastern District Court of Appeals in *Hazelwood* which is reported at 2000 WL 459713.

The *McBride* election contest action was commenced in August of 1996 before the Fire Protection District actually imposed the levy. Whether or not the August 6, 1996, election approved or disapproved the 10¢ levy and had therefore been lawfully adopted could only be determined in a single election contest brought by "registered voters" under the authority of Section 115.553.2, RSMo. Election results with respect to an issue put before the voters cannot be questioned other than in statutory election proceedings such as was done in *McBride*. *State on inf. Anderson ex rel. Conway v. Consolidated School District No. R4 of Iron County*, 417 S.W.2d 657 (Mo. banc 1967). Section 115.553.2, RSMo, further provides that "proponents" and "opponents" of a ballot question "shall have the right to engage counsel to represent and act for them in all matters involved in and pertaining to the election contest." (emphasis added).

Consequently, the initiation of the election contest in *McBride* in August 23, 1996, was long before December 31, 1996, when property taxes for 1996 became due. The

final results of that election contest action were binding upon the Fire Protection District and upon all voters and taxpayers in the same manner as if a class had been certified since there could only be one action. The issue of whether the 10¢ tax levy was lawfully adopted by the voters had to be determined in *McBride*. No adjudication could have been made in *Hazelwood* with respect to whether the election approved the 10¢ levy until the *McBride* action had been determined.

The filing of the *McBride* case satisfied the "before December 31" requirements enunciated by Judge Wolff in his Concurring Opinion in *Green I*, which was then adopted after the *Hazelwood* opinion by the Eastern District of the Court of Appeals in *Koehr I* and the Southern District of the Court of Appeals in *Green*.

Ring did not involve ad valorem property taxes but rather sewer fees of the Metropolitan St. Louis Sewer District imposed by its Ordinance No. 8657 adopted on May 13, 1992, to be effective on July 1, 1992. A suit ("*Beatty*") alleging that the sewer fees were taxes which were subject to the voter approval requirements of Hancock was commenced on June 17, 1992, before the sewer fee charges became effective. Also, the trial court made its determination on June 29, 1992, before the sewer fees became effective. See, *Beatty v. Metropolitan St. Louis Sewer District*, 914 S.W.2d 791, 793-94 (Mo. banc 1995) ("*Beatty III*"). In *Beatty v. Metropolitan St. Louis Sewer District*, 867 S.W.2d 217 (Mo. banc 1993) ("*Beatty II*"), the Court held that the sewer fees imposed by Ordinance No. 8657 were taxes which could not under Hancock be imposed without voter approval.

In *Beatty III*, 914 S.W.3d at 793, the Supreme Court expressly held that "*MSD* [the St. Louis Metropolitan Sewer District] has expressly waived sovereign immunity pursu-

ant to its Ordinance Number 8657, section 12." (emphasis added). Consequently, sovereign immunity was not a bar to a class action suit in *Ring*.

Hence, in *Beatty* and *Ring* there had been a waiver of sovereign immunity by the taxing district and a suit challenging the taxes was commenced and heard before the tax became effective. Appellants and *Amici* aligned with Appellants cannot take any comfort from *Ring* upon which *Hazelwood* relied.

Also, it should be noted that Judge Wolff in *Green I* and Judge Price in *Hazelwood* (as well as the Court's Opinion in *Green I*) relied upon *Fort Zumwalt School District v. State*, 896 S.W.2d 918 (Mo. banc 1995). In *Fort Zumwalt* the Supreme Court found that Article X, Section 23, adopted as a part of the Hancock Amendment and authorizing actions to enforce the Hancock Amendment, did not effect a waiver of sovereign immunity for a "money judgment":

> "If Section 23 is a consent by the state to be sued for general money damages to enforce Section 21, the consent exists by way of inference or implication. This Court **will not infer or imply that a waiver of sovereign immunity extends to remedies that are not essential to enforce the right in question**.
>
> * * *
>
> "[W]e will not read Section 23 as a consent to a suit for a money judgment to enforce Section 21, except for the taxpayer's reasonable attorneys fees and costs." (Emphasis added). 896 S.W.2d at 923.

No reason exists why the same rationale does not apply with respect to the enforcement of Section 22 of Hancock which is here involved as applies to Section 21 of Hancock which was involved in *Fort Zumwalt*.

Section 18 of the Hancock Amendment, however, specifically provides for and authorizes a refund when taxes and revenues are collected by the state in excess of the state revenue limit of Hancock set forth in Section 18 –

> "(b) For any fiscal year in the event that **total state revenues** exceed the revenue limit established in this section by one percent or more, the **excess revenues shall be refunded** pro rata. . . ." (emphasis added).

Section 22 sets forth the Hancock limitations on political subdivisions of the state. Section 22 contains no provisions for a refund of local taxes. Consequently, no waiver of sovereign immunity for monetary judgments on awards by political subdivisions can be found in Section 22 of Hancock. Instead, as Judge Wolff reasoned in *Green I* (whose Concurring Opinion was adopted by the Eastern District and the Southern District of the Court of Appeals in *Koehr I* and *Green II*, respectively) when considering the provisions of Section 22 of Hancock relating to taxes of political subdivisions:

> "But the manner of enforcement of Hancock's mandates is subject to the orderly procedures **established by statute**.
>
> * * *
>
> "Except for the provision relating to attorneys' fees, the enforcement provision of the Hancock Amendment, **Section 23, is not a consent to suit for money judgment**. *Fort Zumwalt*, 896 S.W.2d at 923.

"Thus, **an action for property tax refunds must conform to statutory requirements**, and, specifically, the action must be timely." (emphasis added). 13 S.W.3d at 287.

Because there was no action brought before December 31, 2001, when the 2001 property taxes became due and payable, the only remedy to challenge the lawfulness of any 2001 property taxes are refund claims taken and brought in this case pursuant to the payment under protest provisions of Section 139.031, RSMo. Section 139.031, RSMo, only provides a refund remedy for those individuals or entities who follow its proce-

dures.[17] There is no other provision of law which either provides a remedy or waives, in effect, sovereign immunity. See, *Community Federal Savings and Loan Association v. Director of Revenue*, 752 S.W.2d 794 (Mo. banc 1988), and *Community Federal Savings*

[17] We note that *amici* David Humphreys and Tamko Roofing Products, Inc., in *Humphreys v. Mosbaugh*, Case No. 03CV680239, Jasper County Circuit Court, which was commenced on March 7, 2003, seek refunds with respect to 2001 property taxes paid under protest pursuant to Section 139.031, RSMo. They also seek to certify a class of all real property taxpayers in Jasper County even though the other taxpayers did not pay their 2002 property taxes under protest. Section 139.031, RSMo, does not afford a remedy on a class basis and class relief to secure tax refunds with respect to 2002 taxes cannot be secured in an action filed on March 7, 2003. See, denying recovery of tax refunds on a class basis, *Charles v. Spradling*, 524 S.W.2d 820 (Mo. banc 1975); *State ex rel. Ellsworth Freight Lines, Inc. v. State Tax Commission*, 651 S.W.2d 130 (Mo. banc 1983); *H.S. Construction Co. v. Lohman*, 950 S.W.2d 331 (Mo. App. W.D. 1997); *State ex rel. Lohman v. Brown*, 936 S.W.2d 607 (Mo. App. W.D. 1997); and *Jenkins v. Missouri*, 1990 WL 362044 (U.S. Dt. Ct. W.D. Mo. 1990) [applying Missouri law and holding that Kansas City School District property taxes which the United States Supreme Court had determined had been unconstitutionally imposed could only be refunded to those individuals who had paid taxes under protest and had commenced timely action in the Jackson County Circuit Court]; affirmed *Jenkins v. State of Missouri*, 962 F.2d 762 (8th Cir. 1992), cert. denied 113 S.Ct. 322 (1992).

and Loan Association v. Director of Revenue, 796 S.W.2d 883 (Mo. banc 1990), holding that sovereign immunity bars any relief with respect to unconstitutional taxes which have been paid and that statutes waiving sovereign immunity and allowing for tax refunds must be strictly construed.

For the above and foregoing reasons, the Judgment of the trial court dismissing the Appellants' claims for declaratory and other relief should be affirmed.

III.

In The Alternative To Point I, The Trial Court Properly Dismissed The Tax Refund Claims Of The Appellants Because Of The Failure Of The Appellants To Allege With Specificity Their Compliance With The Requirement Of Section 139.031, RSMo, So As To State Claims For Tax Refunds.

Standard of Review

In affirming a dismissal of a tax refund claim for failure to state a claim, the Eastern District of the Missouri Court of Appeals in *Missouri American Water Company v. Collector of St. Charles County*, 103 S.W.3d 266, 268 (Mo. App. E.D. 2003), enunciated the standard of review test set forth in *Nazeri v. Missouri Valley College*, 860 S.W.2d 303 (Mo. banc 1993), in the following manner – "Because this is an appeal from the grant of a defendant's motion to dismiss for failure to state a claim, we accept as true all well-pled allegations in American Water's petition and liberally grant it all reasonable inferences drawn therefrom. * * * A motion to dismiss for failure to state a claim is solely a test of the plaintiff's petition. * * * We do not attempt to weigh whether alleged facts are

credible or persuasive. * * * 'Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.' [quoting from *Nazeri* at page 306]."

Argument

The trial court determined that the Appellants in their Count IV did not state a claim for a tax refund with sufficient specificity to be entitled to relief pursuant to Section 139.031, RSMo. The Western District in its Opinion concluded that Count IV should survive a motion to dismiss, but that a motion for more definite statement should be granted. In the alternative to Point I, Respondent School District states that the Judgment of the trial court dismissing the Appellants' tax refund claims should be affirmed because the Appellants did not state a claim for tax refunds pursuant to Section 139.031, RSMo.

After incorporating by reference the previous allegations in their Petition, the Appellants in their Count IV claim for tax refunds allege:

> "45. Plaintiff Taxpayers have paid their 2001 property taxes to Defendant Collector Hunter under protest that the School District's tax rate was in excess of that permitted by law.
>
> "46. The Defendant School District's 2001 tax rate of $2.75 was in excess of that permitted by law.
>
> "47. Plaintiff Taxpayers have paid their taxes under protest pursuant to § 139.031 RSMo, and bring this action against the Defendant Col-

> lector Hunter to collect the property taxes levied by Defendant School District in excess of that permitted by law and paid under protest pursuant to § 139.031 RSMo."

See, App. Br. A-12.

Section 139.031, RSMo 2000, provides, in pertinent part:

> "1. Any taxpayer may protest all or any part of any taxes assessed against him, . . . Any such taxpayer desiring to pay any taxes under protest **shall, at the time of paying such taxes, file with the collector a written statement setting forth the grounds on which his protest is based. The statement shall include the true value in money claimed by the taxpayer if disputed.**
>
> "2. . . . [E]very taxpayer protesting the payment of taxes shall, within ninety days after filing his protest, commence an action against the collector by filing **a petition for the recovery of the amount protested** in the circuit court of the county in which the collector maintains his office." (emphasis added).

The standard for considering the procedural sufficiency of a petition asserting a refund claim under Section 139.031, RSMo, upon a motion to dismiss for failure to state a claim is much more stringent than the test applied in other types of cases. In *Boyd-Richardson Company v. Leachman*, 615 S.W.2d 46 (Mo. banc 1981), this Court affirmed a trial court's dismissal (on motion) of petitions seeking tax refunds pursuant to Section 139.031, RSMo, because the plaintiffs did not sufficiently allege compliance with

the requirements of and conditions precedent to maintaining such tax refund action. The Opinion in *Boyd-Richardson* reasoned:

> **"The filing of ordinary lawsuits do not have the drastic effect of forestalling the use of money by the defendant**, but under §139.031 the agencies for whose benefit the tax is collected are prohibited from its use for what can be a substantial period of time. **The statute, § 139.031, justifiably requires specificity in these circumstance** and the Court will enforce that requirement."

Id. at 50 (emphasis added).

And, more recently, in *Pac-One, Inc. v. Daly*, 37 S.W.3d 278 (Mo. App. E.D. 2000), the Court affirmed a dismissal of a petition seeking a tax refund when the petition did not sufficiently allege compliance with the requirements of and conditions precedent under Section 139.031, RSMo. See also, *Metal Form Corporation v. Leachman*, 599 S.W.2d 922 (Mo. banc 1980); *State ex rel. National Investment Corp. v. Leachman*, 613 S.W.2d 634 (Mo. banc 1981); *Stout Industries, Inc. v. Leachman*, 699 S.W.2d 129, 131 n. 2 (Mo. App. E.D 1985); and *Stanton v. Wal-Mart Stores, Inc.*, 25 S.W.3d 538 (Mo. App. W.D. 2000) (failure of Wal-Mart to show that it had filed written statement with the collector at the time it paid its taxes defeated its refund claim under Section 139.031, requiring strict compliance with the provisions of Section 139.031, RSMo).

None of the 12 Appellant taxpayers alleged in their Petition that they complied with <u>all</u> of the requirements of and conditions precedent to bringing an action pursuant to

Section 139.031, RSMo. Section 139.031 in effect requires allegations of compliance with all of the following:

1. ". . . [A]t the time of paying such taxes" each taxpayer must file a written statement with the collector.
2. The "written statement" of each taxpayer paying taxes under protest must "set . . . forth the grounds on which his protest is based".
3. The "written statement" must also "include the true value in money claimed by the taxpayer."
4. The grounds set forth in the petition for a tax refund must be the same as set forth in the "written statement."
5. The petition seeking a tax refund must be filed within 90 days after paying the taxes under protest and meeting the foregoing requirements.

The allegations in Count IV of the Petition which are above quoted did not allege facts showing compliance with the foregoing five requirements. Nor has any Appellant alleged even generally compliance with the requirements of Section 139.031, RSMo. Even absent the stringent requirements which have been applied to maintaining a Section 139.031 case, none of the Plaintiffs have generally alleged compliance with all conditions precedent which is minimally required by Rule 55.16, Mo. R. Civ. P.

In both *Boyd-Richardson* and *Metal Form* the refund action failed because the "written statement" required by Section 139.031, RSMo, was not sufficient. Here, the 12 Appellants did not even allege that they filed a "written statement" at the time they paid their taxes, let alone the grounds set forth in any "written statement." Furthermore, none

of the 12 taxpayer Appellants have alleged "the true value in money" which he or she is claiming.

As this Court stated in *Boyd-Richardson, supra,* "[t]he statute, § 139.031, justifiably requires specificity in these circumstances and the Court will enforce that requirement." 615 S.W.2d at 50. In the alternative to Point I, this Court should "enforce that requirement" here and affirm the trial court's dismissal of Appellants' tax refund claims.

IV.

Alternatively, In Response To Appellants' Points I, II, III, IV And V, The Trial Court Did Not Err In Dismissing Counts I, II, III, IV And V Of Appellants' Petition Because Appellants Have Failed To Show A Potential Violation Of Article X, Section 22(a), By The School District Setting Its Operating Levy At $2.75 In That The Missouri Supreme Court Has Already Determined That The School District's "Maximum Authorized Current Levy" Under Article X, Section 22(a), Is $3.15.

Standard of Review

In affirming a dismissal of a tax refund claim for failure to state a claim, the Eastern District of the Missouri Court of Appeals in *Missouri American Water Company v. Collector of St. Charles County*, 103 S.W.3d 266, 268 (Mo. App. E.D. 2003), enunciated the standard of review test set forth in *Nazeri v. Missouri Valley College*, 860 S.W.2d 303 (Mo. banc 1993), in the following manner – "Because this is an appeal from the grant of a defendant's motion to dismiss for failure to state a claim, we accept as true all well-pled allegations in American Water's petition and liberally grant it all reasonable inferences

drawn therefrom. * * * A motion to dismiss for failure to state a claim is solely a test of the plaintiff's petition. * * * We do not attempt to weigh whether alleged facts are credible or persuasive. * * * 'Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.' [quoting from *Nazeri* at page 306]."

Argument

In Counts I, II, III and IV Appellants contend the School District has violated Article X, Section 22(a) because the School District set its operating levy at $2.75 and the $2.75 rate was in excess of the "maximum authorized current levy" permitted by Article X, Section 22(a). In *Green v. Lebanon R-III School District*, 13 S.W.3d 278, 281-282 (Mo. banc 2000) ("*Green I*"), the Missouri Supreme Court determined that the "maximum authorized current levy" under Article X, Section 22(a), is the higher of the amount in effect on November 4, 1980, or the highest amount approved by the voters since that date.

Green I decided not just the *Green v. Lebanon R-III School District* appeal, but also the *King v. Morgan County R-II School District* appeal which was docketed in the Supreme Court as SC81746. Appellants Liston King, Martha King and Patricia Hoff who were Appellants in *King*, are also Appellants in this case and are barred by res judicata or collateral estoppel from contesting the determinations in *Green I.* The other Appellants may be barred by the doctrine of virtual representation.

This Court may judicially notice its own records. *Sympson v. Rogers*, 314 S.W.2d 717, 721 (Mo. 1958). See also, *Williams v. Rape*, 990 S.W.2d 55 (Mo. App. W.D. 1999) (Stith, J.), where judicial notice was taken of prior litigation in dismissing a case upon grounds that claims had been determined in prior litigation.

In *Green I*, this Court determined that the "maximum authorized current levy" of the Respondent Morgan County R-II School District through 1998 (the last tax year in question in *Green I*) was $3.15, a rate adopted by the voters in 1983. *Green I*, 13 S.W.3d at 281-282.

Consequently, Appellants have not shown that setting the School District's tax rate at $2.75 was in excess of the "maximum authorized current levy" of $3.15 permitted by Article X, Section 22(a).

Because Appellants' pleadings fail to set forth facts which show there is a potential violation of Article X, Section 22(a), Appellants have asked the Court to decide a hypothetical question which does not present a justiciable controversy. Accordingly, the Trial Court's dismissal of Counts I, II, III, and IV should be affirmed. See *Hayward v. City of Independence*, 967 S.W.2d 650, 654 (Mo. App. W.D. 1998).

V.

The Trial Court Did Not Err In Dismissing Count V Of Appellants' Petition Because In Order For A Taxpayer To Recover Attorneys' Fees Pursuant To Article X, Section 23, The Suit Must Be Successful And The Suit Must Have Been Brought To "Enforce" The Provisions Of Article X, Section 16 Through 22(a).

Standard of Review

In affirming a dismissal of a tax refund claim for failure to state a claim, the Eastern District of the Missouri Court of Appeals in *Missouri American Water Company v. Collector of St. Charles County*, 103 S.W.3d 266, 268 (Mo. App. E.D. 2003), enunciated the standard of review test set forth in *Nazeri v. Missouri Valley College*, 860 S.W.2d 303 (Mo. banc 1993), in the following manner – "Because this is an appeal from the grant of a defendant's motion to dismiss for failure to state a claim, we accept as true all well-pled allegations in American Water's petition and liberally grant it all reasonable inferences drawn therefrom. * * * A motion to dismiss for failure to state a claim is solely a test of the plaintiff's petition. * * * We do not attempt to weigh whether alleged facts are credible or persuasive. * * * 'Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.' [quoting from *Nazeri* at page 306]."

Argument

The short argument is that the trial court dismissed all of the claims which the Appellants set forth in Counts I through IV of the Petition, and that being the situation, Appellants are not entitled to attorneys fees.

But even if, *arguendo*, it be determined that Appellants can proceed with any of their claims alleged in Counts I through IV, Appellants still would not be entitled to attorneys fees because those Counts do not set forth claims to "enforce" the provisions of the Hancock Amendment.

Section 23 of Article X provides for authority by the courts "to enforce" the provisions of the Hancock Amendment, i.e., --

> "Notwithstanding other provisions of this constitution or other law, **any taxpayer** of the state, county, or other political subdivision shall have standing to bring a suit . . . **to enforce the provisions of sections 16 through 22**, inclusive, of this article and, **if the suit is sustained, shall receive** from the applicable unit of government **his costs, including attorney fees** incurred in maintaining such suit."

(emphasis added.)

"To enforce" means "to compel observance of; as to *enforce* the laws". *Webster's New Twentieth Century Dictionary of The English Language, Unabridged* 602 (2nd ed. 1979). The action "to enforce" must be to "compel observance of" the Hancock Amendment, i.e., to prevent. Thus, an action "to enforce" connotes a suit sounding in equity for an injunction or for specific performance, not a suit as here which seeks de-

claratory relief or a suit for recoveries of monies, i.e., tax refunds pursuant to Section 139.031, RSMo.

The Appellants' lawsuit was commenced in 2002 and relates to property taxes that were levied by the Respondent School District in 2001. It is not a suit to "enforce" provisions of the Hancock Amendment by enjoining the collection of 2001 property taxes. The suit did not seek such injunctive relief, nor could such injunctive relief have been granted after the tax year in question. *Metts v. City of Pine Lawn*, 84 S.W.3d 106 (Mo. App. E.D. 2002). With respect to violations of Article X, Section 22(a), the only suit for which attorneys fees could be recovered would be for an order compelling the tax levy to "be reduced" before the taxes are collected or become due and payable, i.e., the taxpayer would need to seek injunctive relief.

The declaratory relief which Appellants assert in Counts I, II and III do not constitute a "suit" to "enforce" the Hancock Amendment. And, Count III, at most, only requests an interpretation as to "whether Chapter 163 RSMo requires Loss or Reduction in State Aid when Section 22 of Article 10 requires a levy reduction."

It is further noted that while Counts I, II and III of the Appellants' Petition request an award of attorneys fees pursuant to Section 23 of the Hancock Amendment, Count IV of the Petition which seeks class refunds does not request an award of attorneys fees. Section 139.031, RSMo, setting forth the rights for recovery of refunds of taxes paid under protest does not provide or authorize an award of attorneys fees.

While Section 23 of the Hancock Amendment could have provided for an award of attorneys fees to a "prevailing" party bringing suit "with respect to" the Hancock

Amendment, it does not contain such language. When the plain meaning of the word "enforce" in the contest of type of "suit" is given effect, the claims of the Appellants, even if, *arguendo*, they eventually be successful, do not come within the type of "suit" for which attorneys fees may be awarded.

To award attorneys fees for these claims compounds the expense to the Respondent Morgan County R-II School District. To paraphrase Judge Wolff's Concurring Opinion in *Green I*, it would be preferable if "school district funds . . . would be spent on educating school children". 13 S.W.3d at 287.

The trial court properly dismissed Count V of Appellants' Petition.

CONCLUSION

For the reasons stated above, the Trial Court did not err in dismissing Appellant's Petition with prejudice, and its Judgment should be affirmed.

Respectfully submitted,

HUSCH & EPPENBERGER, LLC

By_____

ALEX BARTLETT, #17836

Monroe House, Suite 300
235 East High Street
Jefferson City, MO 65101
Office: (573) 635-9118
Fax No: (573) 634-7854

ATTORNEYS FOR RESPONDENT
MORGAN COUNTY R-II
SCHOOL DISTRICT

CERTIFICATE OF COMPLIANCE
WITH RULE 84.06

The undersigned certifies:

1. That this Brief complies with Rule 84.06; and

2. That this Brief contains 22,896 words according to the word count feature of Microsoft Word Version 1997 software with which it was prepared.

3. That the disks accompanying this Brief have been scanned for viruses, and to the best of his knowledge are virus-free.

4. That this Brief meets the standards set out in Mo. Civil Rule 55.03.

_____

Alex Bartlett

CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of the foregoing Brief along with a double-sided, high-density IBM PC compatible disk with the text of the Brief were hand-delivered or mailed via United States Mail, postage prepaid, on July 31, 2003, to:

Craig S. Johnson
Col. Darwin Marmaduke House
700 East Capital, P.O. Box 1438
Jefferson City, MO 65102
Attorney for Appellants

Marvin Opie
Morgan County Prosecuting Attorney
211 East Newton
Versailles, MO 65084
Attorney for Morgan County Collector Clark Hunter

James R. Layton,
Assistant Attorney General
Supreme Court Building, P.O. Box 899
Jefferson City, MO 65102
Attorney for Jeremiah (Jay) Nixon
Missouri Attorney General

Joe Rebein
Shook, Hardy & Bacon, LLP
One Kansas City Place
1200 Main Street
Kansas City, MO 64105
Attorney for *Amici Curiae*

Ann Covington
Bryan Cave, LLP
One Metropolitan Square
211 N. Broadway, Suite 3000
St. Louis, MO 63102
Attorney for *Amici Curiae*

Penny Rector
398 Dix Road, Suite 201
Jefferson City, MO 65109
Attorney for *Amici Curiae*

Kelli Hopkins
2100 I-70 Drive Southwest
Columbia, MO 65203
Attorney for *Amici Curiae*

_____
Alex Bartlett